123-356

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 322. 47

EMIL OELBERMANN, LOUIS F. DOMMERICH AND HUGO PEEPERS, PLAINTIFFS IN ERROR,

vs.

EDWIN A. MERRITT, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 27, 1884.

3.

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JUDD & DETWEILER, PRINTERS, WASHINGTON.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between Emil Oelbermann, Louis F. Dommerich, and Hugo Peipers, plaintiffs, and Edwin A. Merritt, defendant, a manifest error hath happened to the great damage of the said Emil Oelbermann, Louis F. Dommerich, and Hugo Peipers, as is said, and as appears by their complaint. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid on the second Monday of October next, that the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right, and according to the law and custom of the United States, ought to be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and eighth.

TIMOTHY GRIFFITH,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

Allowed May 28, 1884—
ALFRED C. COXE.

2 UNITED STATES OF AMERICA, *Southern District of New York,* } *ss:*

I, Timothy Griffith, clerk of the circuit court of the United States of America, for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from three to eighty, inclusive, contain a true and complete transcript of the records and proceedings had in said court in the case of Emil Oelbermann, Louis F. Dommerich, and Hugo Peipers, plaintiffs in error, against Edwin A. Merritt, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of said court to be hereunto affixed at the city of New York, in the southern district

of New York, in the second circuit, this fourth day of August, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and ninth.

[Seal of U. S. Circuit Court, South'n Dist. N. York.]

TIMOTHY GRIFFITH,
Clerk.

[Endorsed:] 6615. U. S. Supreme Court. Emil Oelbermann, Louis F. Dommerick, and Hugo Peipers, plaintiffs in error, against Edwin A. Merritt, defendant in error. Writ of error.

Due service of a copy of the within writ of error is hereby admitted this 29 of May, 1884.

ELIHU ROOT,
Attorney for the Defendant in Error.

3 UNITED STATES CIRCUIT COURT, } ss.:
For the Southern District of New York.

EMIL OELBERMANN, LOUIS F. DOMMERICH, AND HUGO PEIPERS
against
EDWIN A. MERRITT, Collector of the Port and District of New York.

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiffs' attorneys within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Morrison R. Waite, Chief Justice of Supreme Court of the United States, at the city of New York, this 8th day of November, in the year one thousand eight hundred and eighty.

[L. S.] JOSEPH M DEUEL, *Clerk.*

CHAMBERLAIN, CARTER, & EATON,
Plaintiffs' Attorneys,

Office and post-office address, 346 Broadway, New York.

4 [Endorsed:] United States circuit court, southern district of New York. Emil Oelbermann *et al.*, *vs.* Edwin A. Merritt, collector, &c. Summons. Chamberlain, Carter, & Eaton, plaintiffs' attorneys. Received Nov. 18, 1880. U. S. attorney's office.

5 Circuit Court of the United States, Southern District of New York.

EMIL OELBERMANN, LOUIS F. DOMMERICH, and HUGO PEIPERS
against
EDWIN A. MERRITT, Collector of the District of New York.
No. 6615.

The plaintiffs, by Chamberlain, Carter, and Eaton, their attorneys, complain of the defendant and allege as follows:

That at the times hereinafter mentioned the plaintiffs were copartners, doing business in the city of New York, under the firm name and style of E. Oelbermann & Co.

That at the same time the defendant was the collector of the port and district of the city of New York.

That on or about the 19th day of June, 1879, the plaintiffs imported into said port certain merchandise in the steamship "Rotterdam," from Mülheim, Germany, the full particulars of which
6 importation are set forth in the bill of particulars, a copy of which is hereto annexed, and that they duly made entry thereof at the custom house, on the date therein mentioned.

That the defendant, as such collector, unlawfully demanded, exacted, and received from the plaintiffs the several sums of money in said bill of particulars mentioned, under color or pretended authority of a statute of the United States, for the collection of duties on imports; which said several sums of money the plaintiffs, in order to obtain possession of said merchandise, paid to the said defendant, as such collector, under protest in writing in due form of law, and in compliance with the requirements of the statute in such case made and provided.

That the demand, exaction, and receipt by the said defendant of said amounts of duties were wholly unauthorized by law.

That on the dates in the said bill of particulars mentioned the plaintiffs gave due notice in writing to the defendant of dis-
7 satisfaction with his decision, demand, and exaction, as aforesaid, and duly appealed therefrom to the Secretary of the Treasury, according to the form of the statute in such case made and provided.

That the said Secretary of the Treasury has decided said appeal adversely to the plaintiffs.

That by reason of the premises the defendant is justly indebted to the plaintiffs in the several sums of money in said bill of particulars mentioned, with interest from the dates of said payments; which said sums the defendant, although requested, has hitherto wholly neglected and refused to pay to the plaintiffs.

Wherefore the plaintiffs demand judgment against the defendant for the sum of four thousand nine hundred and twenty-five and $\frac{20}{100}$ dollars ($4,925.20), with interest, as aforesaid, together with the costs of this action.

CHAMBERLIN, CARTER & EATON,
Attorneys for Plaintiffs,
346 *Broadway, New York City.*

8 Circuit Court of the United States for the Southern District of New York.

EMIL OELBERMANN, LOUIS F. DOMMERICH, and HUGO PEIPERS
against
EDWIN A. MERRITT, Collector of the District of New York.
No. 6615.

NEW YORK, *December 9th*, 1880.

STEWART L. WOODFORD, Esq., *Defendant's Attorney.*

SIR: Please take notice that the annexed is a bill of particulars of the plaintiffs' demand in this case, and for the recovery of which this action is brought, by reason of money illegally exacted of the plaintiffs by the defendant, as collector of the port of New York, on merchandise imported in the vessel and at the date named in the annexed schedule.

Truly yours,

CHAMBERLIN, CARTER & EATON,
Plaintiffs' Attorneys.

9 *Bill of Particulars.*—No. 6615.

Name of importer—Emil Oelbermann, Louis F. Dommerich, Hugo Peipers, composing the firm of E. Oelbermann & Co.
Description of merchandise—34 cases silk and cotton velvets.
Place whence imported—Mülheim, Germany (*via* Rotterdam, Holland).
Name of vessel—Steamship "Rotterdam."
Date of invoice—June 5, 1879.
Date of entry at custom house—June 19, 1879.
Date of payment of duties—June 19, 1879; October 11, 1879, and October 17, 1879.
Date of filing protest—October 18, 1879.
Date of appeal to Secretary of Treasury—October 23, 1879.
Date of decision on appeal—August 26, 1880.
Amount of excess claimed—$4,925.20.

Of the above	$232.80	was paid	June 19, 1879.
" " "	1,581.60	" "	October 17, 1879.
" " "	3,110.80	" "	October 11, 1879.
	$4,925.20		

10 (Endorsed:) U. S. circuit court, southern district of New York. Emil Oelbermann *et al.* against Edwin A. Merritt, collector, &c. Copy, complaint and bill of particulars. Chamberlain, Carter & Eaton, attorneys for plaintiffs, 346 Broadway, N. Y. To Stewart L. Woodford, Esq., att'y for def't. Received, U. S. attorney's office, Dec. 9, 1880.

11 *Affidavit of Service of Answer.*

U. S. Circuit Court.

EMIL OELBERMANN & ANO.
against
EDWIN A. MERRITT, Collector, etc.

SOUTHERN DISTRICT OF NEW YORK, } ss:
City and County of New York, }

Andrew J. Clifton, being duly sworn, says he is a clerk in the office of Stewart L. Woodford, United States attorney; that on the 22d day of December, 1880, at about 4:30 p. m., he served a copy of the hereto annexed answer upon Chamberlain, Carter & Eaton, pl'ff's att'ys in this action, by delivering said copy to and leaving the same with a person in the office of the said Chamberlain, Carter & Eaton, pl'ff's att'ys.

And deponent further says he is over seventeen years of age.

ANDREW J. CLIFTON.

Sworn to before me this 4th day of January, 1881.

THOMAS GREENWOOD,
Notary Public, No. —, N. Y. County.

12 United States Circuit Court Southern District of New York.

EMIL OELBERMANN & ANO.
versus
EDWIN A. MERRITT, Collector, etc.

The answer of the defendant herein, by Stewart L. Woodford, his attorney, to the complaint of the plaintiffs in the above-entitled action.

I. He admits he was, at the times in said complaint mentioned, collector of the port of New York, and, in such official capacity, received payment from the plaintiffs for and on account of duties due to the United States, under the laws thereof, upon certain importations of merchandise imported by said plaintiffs into the port of New York from foreign countries.

II. He alleges that any and all moneys received by him from plaintiffs at the times in said complaint mentioned, were paid by said plaintiffs as a debt due by them to the United States, and not otherwise; and were received by defendant by virtue of his office as said collector and under the direction of the Secretary of the Treasury, and for and on account of the United States, and were forewith thereafter and before the commencement of this action, or the service of any protest, paid into the Treasury of the United States; and that the amount of said moneys, so received from plaintiffs, were the amounts due from them to the United States, according to the rate of duty imposed by law upon the several articles of merchandise by them imported and assessed with duty, and no

other sums than duties regularly assessed and ascertained and liquidated according to law upon the plaintiff's import entry thereof were collected or received by defendant from the plaintiffs.

III. And defendant further answering, denies that he has at this time sufficient information to form a belief as to the precise description of the merchandise contained in the several packages referred to in the said complaint, by the marks and numbers and description there given, except in so far as to state, and defendant herein answering doth aver and state, that said merchandise was not dutiable according to the laws of the United States, at the rates specified in the complaint.

IV. And defendant further answering admits that the plaintiffs filed with the defendant certain protests, but he denies that he has sufficient information to form a belief as to whether, upon the importations in question, protests and appeals were made by the plaintiffs, conformable to the laws of the United States, and defendant leaves plaintiffs to make such proof thereof as they may be advised.

V. And as to any other allegations in said complaint contained, not hereinbefore fully answered or admitted, defendant denies the same, and each thereof, and leaves the plaintiffs to make such proof thereof as they may be advised.

Wherefore defendant demands judgment, that the complaint be dismissed with costs.

STEWART L. WOODFORD,
United States Attorney, Attorney for Defendant.

13 Endorsed: U. S. circuit court southern district of New York. Emil Oelbermann & ano. *vs.* Edwin A. Merritt, collector, etc. Answer. Stewart L. Woodford, United States attorney, attorney for defendant. Due service of a copy of the within answer is hereby admitted. New York, Dec. 22, 1880. To C. C. & E. plaintiff's attorneys.

14 At a stated term of the circuit court of the United States of America for the southern district of New York in the second circuit, held at the United States court-rooms in the city of New York, on Wednesday, the 20th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The honorable Hoyt H. Wheeler, acting circuit judge.

EMIL OELBERMANN *& al.*
versus
EDWIN A. MERRITT. } 6615.

Now comes the plaintiffs, by Eugene H. Lewis, Esq., their attorney, and move the trial of this cause. Likewise comes the defendant, by Samuel B. Clarke, assistant U. S. attorney, his attorney. Thereupon a jury is impaneled and the cause proceeds for trial. After hearing the evidence of the parties and the argument of counsel, the court directs the jury to find a verdict for the defend-

ant. Thereupon the jury render a verdict, whereby, in accordance with the instructions of the court, they find for the defendant.

A copy.

[SEAL.] TIMOTHY GRIFFITH, *Clerk.*
H. H. M.

Judgment.

15 United States Circuit Court Southern District of New York.

EMIL OELBERMANN & *al.*
vs.
EDWIN A. MERRITT. } 6615.

The issues in this action having been brought on for trial before Mr. Judge Wheeler and a jury at a circuit court of the October term, 1883, and the issues having been tried and a verdict for the defendant having been duly rendered on the twentieth day of February, 1884, and his costs having been adjusted at $253.35:

Now, on motion of Elihu Root, United States attorney for defendant, it is adjudged that the defendant have judgment against the plaintiffs upon the issues in this action, and that he recover the sum of $253.35, his taxed costs, and have execution therefor.

Judgment signed this 20th day of May, 1884.

JOHN A. SHIELDS, *Deputy Clerk.*

16 Endorsed: United States circuit court. Emil Oelbermann & *al. vs.* Edwin A. Merritt. Judgment roll. Elihu Root, United States attorney for defendant. Costs, $253.35. U. S. circuit court. Filed May 10, 1884, 11 o'c'k. Timothy Griffith, clerk.

17 *Bill of Exceptions.*

Circuit Court of the United States for the Southern District of New York.

EMIL OELBERMAN, LOUIS F. DOMMERICH and HUGO PEIPERS
against
EDWIN A. MERRITT.

And afterwards, to wit, on the 20th day of February, 1884, at the city of New York, this action came on to be tried before the Hon. Hoyt M. Wheeler, district judge, for the district of Vermont, duly assigned to hold this court, and a jury impaneled and sworn to try the issues herein.

The plaintiffs appeared by their counsel, Eugene H. Lewis, Esq., and the defendant by his counsel, Elihu Root, Esq., U. S. attorney, and Samuel B. Clark, Esq., assistant U. S. attorney.

The counsel for the plaintiffs having opened his case to the jury, then put in evidence tending to show that the plaintiffs, doing business as co-partners under the firm name of E. Oelberman & Co., were consignees of certain goods, wares and merchandise, dutiable at 60 per cent. ad valorem, to wit, 34 cases of velvets imported on

the steamship "Rotterdam," from Mülheim, Germany, at the
18 port of New York, in June, 1879; that said merchandise was covered by two invoices, one (No. 6192) for ten cases, numbered severally 4153 to 4162, inclusive, (a copy whereof was received in evidence) and the other (No. 6193) for 24 cases, numbered severally 4163 and 4167 to 4189, inclusive, (a copy whereof was received in evidence); that said merchandise was entered at the custom-house at the port of New York by one entry in writing dated June 19, 1879, which entry embraces both invoices, and a copy whereof was received in evidence and is annexed hereto, marked Exhibit No. 1; that the defendant, then collector of customs at the port of New York, designated two cases from invoice No. 6192 and three cases from invoice No. 6193 for examination by the appraiser, which cases were sent to the public store; that the appraiser after examination raised the entered value of said merchandise more than 10 per cent., and reported such advance in value to the collector; that the plaintiffs thereupon forthwith gave notice to the defendant, as collector, of dissatisfaction with such appraisement; that the collector thereupon selected Levi M. Bates, Esq., a merchant of New York city, to be associated as merchant appraiser with A. P. Ketchum, Esq., general appraiser, in examining and appraising said merchandise; that such proceedings were thereafter had; that the merchant appraiser and general appraiser disagreed and made separate reports of their appraisement to the defendant as collector, who thereupon decided between them and adopted the report of the general appraiser upon the value of said merchandise, and thereupon
19 levied duties at 60 per cent. upon all of said merchandise upon the basis of value fixed by such re-appraisement; that the entered value of the merchandise upon invoice 6192 was 14,164 marks and 60 pfennigs, the charges be 90 marks and commissions at 2½ per cent., being 353 marks and 40 pfennigs, the aggregate entered value of such invoice, including such charges and commissions, being 14,611 marks; that the rate of reduction to dollars is 23 and $\frac{8}{10}$, and that the entered value of such invoice was $3,477; that the entered value of the merchandise upon invoice No. 6193 was 38,485 marks and 70 pfennigs, the charges being 216 marks and the commissions at 2 and ½ per cent., amounting to 967 marks and 50 pfennigs, the aggregate entered value of such invoice, including such charges and commissions, being 39,669 marks 20 pfennigs, which reduced to dollars at $23\frac{8}{10}$ amounted to $9.441; that the aggregate entered value of both invoices was $12,918, upon which a duty of 60 per cent. amounting to $7,750.80 was paid by the plaintiff's to the defendant as collector on the date of entry of the merchandise, to wit, 19th of June, 1879, that the amounts to which the said merchandise was advanced by the said re-appraisement, and the defendant's decision thereon as collector were as follows: The value of invoice 6192 was advanced to 16,439 marks and 70 pfennigs, the charges thereon remaining as entered at 90 marks, and the commission at 2 and ½ per cent. thereon amounting to 413 marks 24 pfennigs, the aggregate value thereof as

advanced, including such charges and commissions, amounting to 16,942 marks 94 pfennigs, or reduced to dollars, $4.032. The value of invoice No. 6193 was advanced to 47,013 marks 91 pfennigs, the charges thereon remaining as entered at 216 marks, and the commissions at 2 and ½ per cent. thereon, amounting to 1180 marks 75 pfennigs, the aggregate value thereof as advanced, including such charges and commissions, amounting to 48,411 marks 66 pfennigs, or reduced to dollars, $11,522; that the total advanced value of the said merchandise after the said re-appraisement was $15,554; that the entered value of each invoice was advanced by the said re-appraisement more than 10 per cent., and the defendant as collector, thereafter, liquidated the duties upon the said merchandise at 60 per cent. upon the advanced valuation of the said merchandise, amounting to $9,322.40, and levied in addition to said regular duty an additional or penal duty of 20 per cent. upon said additional value of said merchandise, amounting to $3,110.80; that the plaintiffs thereafter paid such regular and additional duties as liquidated by the defendant as collector, and thereafter duly protested by a protest in writing (a copy of which was received in evidence and is annexed hereto, marked Exhibit No. 2) which was not read at length, nor was the attention of the court called to it except as hereafter stated, and duly appealed to the Secretary of the Treasury from the said decision of the defendant as such collector, and duly brought this action within the time limited by law; that the total amount of charges and commission on both invoices as entered by the plaintiffs, and reduced to dollars at the proper rate is $387.91, and a duty of 60 per cent. on that amount is $232.74; that the total amount of charges and commission on both invoices as advanced after re-appraisement and reduced to dollars at the proper rate is $452.19, and a duty of 60 per cent. on that amount is $271.31; that the additional or penal duty of 20 per cent. on the advanced valuation, or amount of charges and commissions, to wit; $452.19 is $90.43; that included in the amount of duty as liquidated and executed by the defendant as collector, and as paid by the plaintiffs were the said amounts of $232.74, $271.31, and $90.43.

The plaintiffs, further to sustain the issues on their part, then offered in evidence a letter, addressed by E. Oelbermann & Co. to the defendant as collector, dated July 28th, 1879, to which the defendant, by his counsel, then and there objected on the ground that the said letter was immaterial and incompetent. Thereupon the court sustained such objection, to which ruling of the court the plaintiffs, by their counsel, then and their prayed an exception, which was allowed. The letter referred to is annexed hereto, marked Exhibit No. 3.

The defendant, by cross-examination, brought out evidence tending to show that cases No. 4154 and 4158, upon invoice No. 6192, were designated by the defendant for examination at the public stores; that all the cases on said invoice were afterwards and before official appraisement made, sent to the appraiser's stores; that the appraisement of the goods on the invoice was completed

by the appraiser, Mr. Dutcher, on the 17th day of July, 1879; that it was after that date that a re-appraisement took place; that the payment of the re-appraisement fee was July 22, 1879; that all the cases on invoice No. 6192 were sent to the public store, and that the appraisement of them by the appraiser, Mr. Dutcher, was made on the 17th day of July, 1879; that the re-appraisement advanced the value in the cases of both invoices; that July 22, 1879, was the date of the beginning of the re-appraisement; that the merchant appraiser took an oath on the re-appraisement of each of the said invoices (copies of which oaths were offered in evidence as defendant's exhibits, and are annexed hereto, marked Exhibits A & B respectively); that the merchant appraiser made a report in the case of each invoice, which reports were offered in evidence and are annexed hereto, marked Exhibits C & D respectively; that the general appraiser made a report in the case of each invoice, dated October 4th, 1879, which reports were offered in evidence respectively; that the merchant appraiser advanced the value of the 24 cases upon invoice No. 6193 at an average of 8 and $\frac{9}{10}$ per cent., and the 10 cases of merchandise upon invoice No. 6192, an average of 8 and $\frac{4}{10}$ per cent; that the general appraiser advanced the 24 cases of merchandise upon invoice No. 6193, an average of 22 and $\frac{1}{10}$ per cent., and the ten cases of merchandise upon invoice No. 6192, an average of 16 per cent.; that the merchant and
23 general appraiser disagreed; that the collector, by memoranda dated September 9th as to the ten cases, and October 4th as to the 24 cases, accepted the general appraiser's reports, and on September 18th, as to the ten cases, and on October 7th as to the twenty-four cases, made an order to take additional duty and penalty as per re-appraisement, and that duties were liquidated accordingly.

The plaintiffs, further to sustain the issues on their part, then called as a witness Levi M. Bates, who, being duly sworn, testified that he resided and carried on business in the city of New York; that he remembered serving as merchant appraiser in the case of an importation by E. Oelbermann & Co. of 34 cases of velvets in the summer of 1879; that he received his appointment as merchant appraiser from the collector; that he presented himself at the general appraiser's office for the purpose of acting as merchant appraiser, and there saw the general appraiser.

The plaintiffs' counsel then asked the witness the following question:

Q. "What did you say to him (the general appraiser) in regard to your competency to act as merchant appraiser upon that importation?"

To this question defendant, by his counsel, then and there objected on the ground that it was incompetent and immaterial; and also upon the grounds:

First. That it is not competent now to try the question
24 as to whether the person appointed by the collector was familiar with the goods in question or not; that that is a question which must be determined by the collector.

Second. That if it were competent for the plaintiffs to try the question at all here, it is not competent for them to prove the incompetency of this appraiser by his own mouth, and—

Third. If the question could be tried here, and the plaintiffs had taken the proper proceedings before the collector to enable them to try it here, and, if they could prove it out of the mouth of this witness they cannot prove it by showing what he said to somebody else, not the collector, but the general appraiser.

Thereupon the court sustained such objection; to which ruling of the court the plaintiffs, by their counsel, then and there prayed an exception, which was duly allowed.

The plaintiffs' counsel then asked the witness the following question:

Q. "Will you state whether, at the time you were selected to act as merchant appraiser, you had any familiarity, and if so, how much familiarity, with silk velvets."

To this question the defendant, by his counsel, then and there made the same objection.

Thereupon the court sustained such objection; to which ruling of the court the plaintiffs, by their counsel, then and there prayed an exception, which was duly allowed.

25 The plaintiffs' counsel then asked the witness the following question:

Q. "Will you state what familiarity you had with silk velvets at the time you were appointed merchant appraiser in this case?"

To this question the defendant by his counsel then and there made the same objection.

Thereupon the court sustained such objection, to which ruling of the court the plaintiff's by their counsel then and there prayed an exception, which was duly allowed.

The plaintiffs counsel then asked the witness the following question:

Q. "At the time you were appointed merchant appraiser were you familiar with the value of silk velvets?"

To this question defendant by his counsel then and there made the same objection.

Whereupon the court said: I will exclude that in that form, but I do not intend to cut you off from introducing any competent evidence of the fact that Mr. Bates was not a merchant, that is an experienced man having some familiarity with these goods; that he was not of the class pointed out in the act of Congress as an experienced merchant.

To which ruling of the court the plaintiffs by their counsel then and there prayed an exception, which was duly allowed.

The plaintiff's counsel then asked the witness the following question:

26 Q. "Will you state to the court and jury what steps you took after you became merchant appraiser to examine the merchandise which was the subject of re-appraisement?"

To this question the defendant by his counsel objected on the ground that it was incompetent and immaterial, and because the witness should not be allowed to impeach his own finding as merchant appraiser.

Whereupon the court said: As you put the question I shall exclude it, at the same time I should not exclude evidence that he made no examination at all or that he did not act at all.

To which ruling of the court the plaintiffs by their counsel then and there prayed an exception, which was duly allowed.

The plaintiffs' counsel then asked the witness the following question:

Q. "What did you do in the way of examination of the merchandise which was the subject of that re-appraisement?"

To this question the defendant's counsel then and there made the same objection.

Thereupon the court sustained such objection, to which ruling of the court the plaintiffs by their counsel then and there prayed an exception, which was duly allowed.

The plaintiff's counsel then asked the witness the following question:

27 Q. "Did you make any examination of any of the merchandise which was the subject of that re-appraisement?"

To which question the witness answered that he did, and that his examination was at the appraiser's headquarters on the west side of town.

The plaintiffs' counsel then asked the witness the following question:

Q. "Did your examination of the goods, such as it was, take place in the wareroom at the appraiser's headquarters?"

To this question defendant, by his counsel, then and there made the same objection.

Thereupon the court sustained such objection, to which ruling of the court the plaintiffs, by their counsel, then and there prayed an exception, which was duly allowed.

The plaintiffs' counsel then asked the witness the following questions:

Q. "Who was present?"
Q. "Were the importers?"
Q. "Or either of them?"

Q. "How many cases of merchandise belonging to this invoice did you find there?"

Q. "How many cases did you open or have opened for examination?"

Q. "How many pieces of velvet did you examine?"

Q. "Was that the only examination you made of those goods?"

Q. "Who prepared your report?"

28 Q. "Assuming that you have been examining those goods as a purchaser, and that you did not know who the owners were, and knew nothing of their responsibility, would have you purchased the goods from the examination that you made, if there was nobody behind you to fall back upon if there were any variations in the quality?"

Q. "From whom did you receive the report that you signed?"

To each of the foregoing questions the defendant, by his counsel, then and there severally made the same objection.

Thereupon the court sustained each of said objections, to which rulings of the court the plaintiffs, by their counsel, then and there severally prayed exceptions, which were severally duly allowed.

The plaintifis' counsel then asked the witness the following question:

Q. "Did you read the report that you made?"

To which the witness answered that he did not.

The plaintiffs' counsel then asked the witness the following questions:

Q. "What conversation did you have with the person who presented it (the report) to you for signature?"

Q. "I will ask you whether you remember the case numbers of the different cases of merchandise that you examined?"

Q. "Will you state what they were?"

29 Q. "When you were sitting as merchant appraiser did you consider as evidence of value, a memorandum of prices of velvets which the importers had received upon orders from New York customers for these velvets?"

To these questions defendant's counsel then and there severally made the same objection.

Thereupon the court sustained each of such objections; to which rulings of the court the plaintiffs, by their counsel, then and there severally prayed exceptions, which were severally duly allowed.

The plaintiffs' counsel then said: I would like to state to your honor that my ground for asking the witness how many cases were examined and what were their numbers is for the purpose of raising the point that only such merchandise was appraised as was actually examined; in other words, I contend that if only one case out of ten is examined it is not sufficient to advance the valuation of the others which are not examined.

It was then admitted that the signature of L. M. Bates to the merchant appraiser's oath in both cases and the merchant appraiser's reports in both cases were the signatures of the witness, L. M. Bates.

The plaintiffs, further to sustain the issues on their part, again offered in evidence the letter addressed by E. Oelbermann & Co. to E. A. Merritt, collector of customs, dated July 28th, 1879, marked Exhibit No. 5; to which offer the defendant, by his counsel, then and there objected on the ground that the same was immaterial.

Thereupon the court sustained such objections and excluded
30 said letter; to which refusal the plaintiffs' counsel then and there prayed an exception, which was then and there duly allowed.

Both parties then rested.

The following proceedings then took place:

Plaintiffs' counsel said: "I ask your honor to direct a verdict in favor of the plaintiffs for the sum of $4,925.14, with interest at 6 per cent. from the 26th of September, 1880, the date of protest, being $1,581.60, regular 60 per cent. duty upon the excess of the appraised value of the merchandise over the entered value. The first item, of which that $4,925.14 is made up, is $1,581.60, being 60 per cent duty, computed on the excess of the appraised value of the merchandise over the entered value; the second item being the penalty or additional duty of 20 per cent. computed upon the appraised value of the merchandise, amounting to $3,110.80, and also of $232.74, being the regular 60 per cent. duty upon charges and commissions as stated in the entered value of the merchandise."

The court then asked: "What was meant by the last item?"

Plaintiffs' counsel then said: "I mean by that to raise the question whether any duty whatever can be exacted by the collector upon the charges and commissions."

"The court then asked whether the protest raised that. The plaintiffs' counsel answered that it did, and that he relied on the inconsistency between sections 2906 and 2907 of the Revised Statutes,

and upon the rule that where two provisions of the statute
31 were repugnant and contrary, that should prevail which is most favorable to the citizen."

Plaintiff's counsel then further said: "I ask your honor to direct the jury to find for the plaintiffs for $3,110.80 the penalty or additional duty of twenty per cent. upon the appraised valuation. This is a distinct request from the other, on the ground that that clause which imposes the penalty or additional duty for a failure to enter goods at the correct value is unconstitutional. I ask your honor, as a distinct proposition, to direct the jury to find for the plaintiffs for $361.75, being the regular duty of sixty per cent. and a penal duty of twenty per cent. upon the sum of $452.19, which is the total amount of charges and commissions—in other words, in this request, I include the penal as well as the regular duty. I ask your honor

also to direct the jury to find a verdict for the plaintiffs for $90.44, being the additional duty of twenty per cent. upon the charges and commissions."

But the court severally refused to give each and all of said directions as requested, to each of which refusals counsel for plaintiffs then and there duly prayed an exception, which was duly allowed.

"The defendant's counsel then moved the court to direct a verdict in favor of the defendant, which motion was granted, and a verdict directed for the defendant accordingly, to which direction counsel for the plaintiffs then and there duly prayed an exception, which was allowed.

32 The jury then returned a verdict according to the direction of the court.

And forasmuch as the exceptions, matters, and things aforesaid would not otherwise appear by the record, I have set my hand to this bill of exceptions, which is hereby allowed; and it is ordered that this bill of exceptions be filed as a part of the record, with like force and effect as if it had been made up in form, signed, and filed before the case was given to the jury; and it is further ordered that at any time before the entry of judgment the plaintiffs may have leave to move for a new trial upon this bill of exceptions as upon a case made and settled.

Witness my hand the 2nd day of May, 1884.

HOYT H. WHEELER.

EXHIBIT No. 1.

Arrived ——, 187 .

3563.

William W. Thomas & Co., Custom House Brokers, No. 25 William Street, Room 2.

Entry of merchandise imported by E. Oelbermann & Co. in the S. S. Rotterdam, whereof Lucas is Master, from Rotterdam.

NEW YORK, *June 19th*, 1879.

Marks.	Numbers.	Packages and contents.	60%		Total.
[W]	4153, 4162	Ten cases silk and cotton velvets ..... M.	$14,164 60	$16,439 70 Muhlheim, % R., May 30th, 1879.	
		Rutp. ..... 4,032 Chgs.	90 00	90 00	
		Orig'l ..... 3,477 Com. 2½%	$56 10	418 24	
		Diff. ..... $555 M.	$14,611 00	$16,942 94	
		23.80.		4,032 00	
			$3,477 00	88.10 Oct. 8, '79.	
				$47,013 91 Muhlheim % R., June 5th, 1879.	
[W]	4163, 4167, 4189	Twenty-four cases silk and cotton velvets. M.	$38,485 70	216 00 $15,554, 60%	$9,332 40
		Rutp. ..... 11,522 Chgs.	216 00	1,180 75	
		Orig'l ..... 9,441 Com. 2½%	967 50		
		M.		$48,410 66	
		Diff. ..... $2,081 23.70.	$39,669 20	S. R. C. Q., Jr.	
				$11,529	
		(Excess of deposit, Oct. 17, 1879, refunded.)		$12,918 60	7,750 80
[G. B.]	368	Orig'l $17,730 80	$9,441 00	15,554 J. W. Y.	
		Award 9,332 40	129 18	Taken on deposit of ten thousand doll's	10,000 00
		Ref. $8,418 40		Sept. 2d, '79.	
		B. 414 (N), per mem. J. W. Y.		Wf. per mem.	
		Penalty, $15,554, 20%, $3,110.80. J. W. Y.		Deps., 10,000.	
		R., Oct. 11. G. M. W.		Rec'd. Sept. 2, '79. G. W.	

Examined, R. June 19. J. W. C.

Consignee, Importer or Agent's Oath.

I, E. Oelbermann, do solemnly and truly swear that the invoice and bill of lading now produced by me to the collector of New York, are the true and only invoice and bill of lading by me received, of all the goods, wares and merchandise imported in the steamship Rotterdam, whereof Lucas is master, from Rotterdam, for account of any person whomsoever, for whom I am authorized to enter the same; that the said invoice and bill of lading are in the state in which they were actually received by me, and that I do not know nor believe in the existence of any other invoice or bill of lading of the said goods, wares and merchandise: that the entry now delivered to the collector, contains a just and true account of the said goods, wares and merchandise, according to the said invoice and bill of lading; that nothing has been on my part, nor, to *to* my knowledge, on the part of any other person, concealed or suppressed, whereby the United States may be defrauded of any part of the duty lawfully due on the said goods, wares and merchandise; that the said invoice and declaration therein are in all respects true, and were made by the person by whom the same purport to have been made; and that if at any time hereafter, I discover any error in the said invoice, or in the account now tendered of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district. And I do further solemnly and truly swear that to the best of my knowledge and belief Christoph Andreae of Mulheim, the owner of the goods, wares and merchandise, mentioned in the annexed entry; that the invoice now produced by me exhibits the actual cost or fair market value, at Mulheim in M. $23\frac{8}{10}$ of the said goods, wares and merchandise, all charges thereon, and no other or different discount, bounty or drawback, but such as has been actually allowed on the same.

4154 4158 4163 4170 4183

E. OELBERMANN.

Sworn to this nineteenth day of June, 1879, before me.

B. F. WYMAN, *D.*

34 *Owner's Oath.*

I, ——— ———, do solemnly and truly swear that the entry now delivered by me to the collector of New York contains a just and true account of all the goods, wares and merchandise imported by or consigned to ——— ——— in the ——— whereof ——— ——— is master, from ———. That the invoice which I now produce contains a just and faithful account of the actual cost of the said goods, wares and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing; and no other discount, drawback or bounty, but such as has been actually allowed on the same; that I do not know nor believe in the existence of any invoice or bill of lading other than those now produced by me; and that they are in

the state in which I actually received them; and that the said invoice and the declaration therein are in all respects true, and were made by the person by whom the same purport to have been made. And I do further solemnly and truly swear, that I have not in the said entry or invoice concealed or suppressed anything whereby the United States may be defrauded, of any part of the duty lawfully due on said goods, wares and merchandise; and that if at any time hereafter I discover any error in the said invoice, or in the account now produced of the said goods, wares and merchandise, or receive any other invoice of the same, I will immediately make the same known to the collector of this district.

Sworn to this — day of ——, 187-, before me,

——— ———.

(Indorsed:) 3563. E. Oelbermann & Co. Rotterdam. Paid Jun. 19, 1879. Arrived June | 79. Deposit paid Sept. 2, | 79. Appl. 3312, Oct. 23, | 79—Addl. duty. Protest Oct. 19, | 79, & penalty. Ref. & penalty. Wm. W. Thomas & Co., Custom House Brokers, No. 25 William street, New York. 51,560.

35

EXHIBIT No. 2.

57 GREENE STREET, NEW YORK CITY,
October 16, 1879.

To the Collector of the Port of New York,

SIR: In the matter of the entry and reappraisement of thirty-four (34) cases of black velvet, marked [W] 4153–4162, and 4163 and 4167–4189, entered by us on or about the 19th day of June, 1879, and imported from Mülheim, Germany, on the S. S. Rotterdam, from Rotterdam.

Please take notice that we protest against the payment of the sum of fifteen hundred and eighty-one $\frac{60}{100}$ dollars ($1,581\frac{60}{100}$), and the sum of thirty-one hundred and ten and $\frac{80}{100}$ ($3,110\frac{80}{100}$), exacted from us on the goods in question, and that we protest against the exaction of any duty on said merchandise beyond an amount computed at the rate of sixty (60) per cent. *ad valorem* on the invoice value of the merchandise, exclusive of all costs, charges, and commissions on the same, whether stated on either the invoice or entry, or not.

First. We claim that the liquidation, assessment, and exaction of any duty, in addition to the amount paid on the entry of the goods in question, and also of the additional duty, or penalty, of twenty per cent. *ad valorem*, are not warranted by any law of Congress, because the appraisement of said goods, by force of which the sums beyond the amount paid for duty at the time of the entry of said goods, have been assessed thereon, was not made in accordance with the requirements of law, and therefore the liquidation and assessment of duties and penalty, in addition to the amount paid at the time of entry, are illegal and void.

We claim that said reappraisement is illegal and void for the following reasons; or either of them (R. S., 2922):

(1.) Improper evidence was received on the reappraisement, namely, evidence that the goods in question were imported under orders previously taken from local dealers in this country. (R. S., 2922.)

(2.) Improper evidence was received on the reappraisement, namely, evidence of the prices contained in certain New York orders under which the goods were imported.

(3.) Improper evidence was received on the reappraisement, namely, whereas, the statute requires the appraisers to ascertain the appraised and actual market value of the merchandise, at the time of exportation, in the principal markets of the country of exportation; evidence was received of the value of said merchandise at the place of importation, namely, the city of New York, together with evidence of the prices contained in certain New York orders under which the goods were imported.

(4.) Improper evidence was received on the reappraisement, namely, we were compelled to state on the reappraisement, notwithstanding our protest against stating the same, first, that the goods in question were brought out from the foreign country, under orders taken from New York local dealers; and second, what the prices for the goods were, or were stated to be, in said New York orders. We protested against the right of the appraisers to ask questions regarding these matters, and to compel the production of the papers showing these two things; and such questions were answered and papers produced by us under protest.

(5.) Improper evidence was received on the reappraisement, namely, evidence that the goods were imported under orders previously taken, and evidence of the prices contained in such orders. We do now protest against the same, and against any liquidation of duties based upon the same, and against any additional amount of duty imposed pursuant to the same; and more especially against the exaction of the sum of money now exacted in consequence of such reappraisement. (R. S., 2930.)

(6.) Whereas, the two appraisers before whom the reappraisement was had, namely, A. P. Ketchum, Esq., general appraiser, and L. M. Bates, Esq., merchant appraiser, disagreed—the latter deciding that the goods should be advanced nine and one-half ($9\frac{1}{2}$) per cent., or thereabout, and the former deciding that the goods should
36 be advanced seventeen and three-tenths ($17\frac{3}{10}$) per cent.; and whereas, the collector of the port of New York sustained the report of the general appraiser, affirming the said advance of ($17\frac{3}{10}$) per cent.; and whereas, there was no proper evidence to warrant such advance, we protest against said reappraisement as being null and void; and we protest against the assessment and exaction of any duty by virtue of such illegal appraisement.

(7.) We further claim that the reappraisement was illegal and void, for the following reasons, or either of them, namely: First, because the United States general appraiser, who acted as one of the ap-

praisers of said goods, upon our appeal for a reappraisement, was disqualified to appraise the goods in question, upon our said appeal, he having had some connection with the preliminary appraisement of said goods by the United States appraiser and his assistants, from which preliminary appraisement we appealed, said general appraiser having seen and considered a statement respecting the order prices of a part or the whole of the goods to be appraised, and he having, previous to said reappraisement, formed an opinion respecting the value of the goods in question, and having intimated beforehand what the result of the appraisement would be, so far as his action was concerned, whereby the questions to be decided by the board of appraisers, of which he was a member, were prejudged; and said general appraiser was prejudiced by his such action and consideration of the question involved in the appraisement, and was prejudiced to such an extent that he was not a fair and impartial appraiser; and second, said general appraiser acted as one of the appraisers to reappraise the goods in question in direct violation of the spirit of article 1076 of the general regulations of the of the treasury of 1874, of treasury circular of August 25, 1853, and of treasury circular of December 26, 1848, or either of them, and of various other instructions of the Treasury Department.

(8.) The said reappraisement was illegal and void, also, for the following reasons, or either of them: First, because the said appraisers and each of them, did not diligently and faithfully examine and inspect such packages of the goods described in the in-
37 voice of the goods in question, as were designated by the collector on said invoice, and were ordered to the public stores, there to be opened, examined, and appraised.

(9.) The reappraisement was illegal and void, also, for the following reasons, or either of them—namely, because, first, none of the goods were properly examined by the appraisers; and, second, none of the goods were either properly examined or appraised, or both, except such portions of them, if any, as were designated in the invoice as goods to be opened, examined and appraised, as required by statute, and were ordered to the public stores for such examination, and were there actually examined by both of the appraisers. We make this same objection, and claim with respect to all the goods in question, excepting such packages of the same as were (1) designated by the collector on the invoice to be opened, examined and appraised, if any were so designated, and were (2) ordered to the public stores for examination, if any, and were (3) diligently, faithfully and lawfully examined by the appraisers, if any were so examined; and in this connection we refer particularly to articles 407 and 409 of the Treasury Regulations, 1874, and to sections 2899, 2901 and 2939 of the Revised Statutes. (R. S., 2930.)

(10.) The merchant appraiser selected by the collector of customs to be one of the appraisers of the said merchandise, upon our appeal and request for a reappraisement, was not a merchant duly qualified to appraise such merchandise, as required by law; inasmuch as he was not familiar with the character and value of the goods to be appraised, and was not familiar with and had no present knowledge

of the value of said goods in the principal markets of the country of exportation into the United States, nor was he familiar with the character of, or a judge of, the quality of these or any similar goods, or of their value in any of the markets in the world, sufficient to qualify him to act as said merchant appraiser.

(11.) Because the merchandise in question was not valued and appraised as of the actual date of exportation from the foreign country to the United States, such date of exportation being
38 the date on which the steamship Rotterdam, in which said goods were imported, actually sailed from Rotterdam with the goods on board, said date of sailing being, moreover, a matter of record in the custom-house in the city of New York. Said date was not taken by the appraisers as the period on the appraisement, but another and different date was taken.

Second. We further protest against the assessment and enactment of 20 % additional duty (or penalty) under section 2900 of the Revised Statutes of the United States, or otherwise, for the following reasons, or either of them:

(1.) Because such exaction, whether enforced under and pursuant to said provision in said statute, or otherwise, is in violation of that provision of the Constitution of the United States which declares that no person shall be deprived of his property "without due process of law," said provision being contained in the 5th article of the Amendments to the Constitution of the United States.

(2.) Because such exaction is repugnant to said provision of the Constitution of the United States above set forth—namely, that no person shall be deprived of his property "without due process of law;" the exaction here protested against being, in substance, a penalty to the amount of one-fifth ($\frac{1}{5}$) part of the value of the quantity of merchandise imported, and this exaction being thus in the nature of a penalty or punishment, Congress has no more power to authorize it or to exact it in such a way than it has to exact any other amount, no matter how many times greater, by way of punishment or penalty, or than it has to confiscate any other amount of property without proper judicial proceedings. This exaction of 20 % additional duty (or penalty) deprives us of our property, as we claim, "without due process of law," the only pretended process of law under which this penalty is exacted, being a custom-house reappraisement, and we claim that that is not "due process of law," as contemplated by the said Amendment to the Constitution of the United States.

(3.) Because such exaction violates that provision of the Constitution of the United States which protects a person from
39 being deprived of his property "without due process of law." This exaction of 20 % duty is in the nature of a penalty. Even if Congress had the right to empower a board of custom house appraisers, or a collector of a port, to inflict a penalty without a trial before a civil court, or a trial before a court and jury; nevertheless it had no right to empower such parties, or either of them, to inflict a penalty in a case like this, for the reason that there has been no violation of law, and no omission to comply with any requirements

of law, either on the part of the owner of these goods or on the part of the consignee thereof, or on the part of any other person or persons representing or acting for the same. The law requires that imported goods shall be invoiced at their actual cost when purchased, or at their actual market value at the time and place when and where the same were procured or manufactured, when obtained in any other manner than by purchase; that said goods shall be appraised at the true and actual market value, or wholesale price thereof at the time of exportation, and in the principal markets of the country whence the same have been imported into the United States. There is no provision of law requiring an importer of merchandise to make an addition on the entry, to the invoice value or to declare on the entry, or elsewhere, the market value of the merchandise, at the time of the exportation thereof, in the principal markets of the country of exportation; nevertheless, if the appraised value thereof, although determined by the appraisers, with reference to a period other than that when the cost and market value is required to be stated in the invoice, is higher, by ten per cent., than the invoice or entered value, then this penalty of twenty per centum is inflicted, even though the invoice be in all respects true, and although the entry comply in all respects with the requirements of law. We claim that Congress cannot authorize the exaction of this penalty, there having been no direct violation of any positive requirement of law, and no neglect nor omission to comply with the mandate of the law.

Third. We protest against the assessment of any additional duty (or penalty) of twenty per cent. *ad valorem* (on the appraised value of the merchandise in question) with any costs, charges, and commissions added to said appraised value. We claim that in no case can such additional duty be levied on the costs, charges, and commissions, if any, on said merchandise, because section 2900 of the Revised Statutes provides for the appraisement of only the "actual market value or wholesale price" of the merchandise, and for the imposition of an additional duty of twenty per centum *ad valorem*, on such appraised value, which is the foreign market value of the goods only, exclusive of costs, charges, and commissions thereon. We claim that the appraised value upon which the additional duty (or penalty) of twenty per centum is to be assessed, does not properly include any costs, charges and commissions, and we protest against paying any additional duty on the same.

Fourth. We protest against the exaction of any duty or penalty on the amount of "charges and commissions" on the merchandise in question, because section 2906 of the Revised Statutes provides that the collector shall cause the actual market value, or wholesale price of imported merchandise, at the period of exportation to the United States, in the principal markets of the country from which the same has been imported, to be appraised, and declares that such "appraised value shall be considered the value upon which duty shall be assessed." It is true that section 2907 of the Revised Statutes provides that in determining the dutiable value of merchan-

dise, the costs, charges, and commissions shall be added. We claim, however, that section 2906 and section 2907 are in conflict with each other, and that where there is any conflict or ambiguity in laws of this kind, the doubt must always be resolved in favor of the citizen; and that where there is any doubt or ambiguity in laws imposing duties, the doubt must be resolved in favor of the person upon whom the tax is imposed.

Your obedient services,

E. OELBERMANN & CO.

41 EXHIBIT No. 3.

E. Oelbermann & Co., 57, 59, 61, & 63 Green St.; P. O. box, 3197.

NEW YORK, *July 28th*, 1879.

Hon. E. A. Merritt, Collector of Customs, Port of New York,

DEAR SIR: We have been informed by the general appraiser at this port, A. P. Ketchum, Esq., that a re-appraisement of an invoice of thirty-four cases of velvets, which arrived at this port per steamer Rotterdam from Mulheim June 19th, 1879, and were consigned to us, the several cases being designated by the numbers 4153–4162, 4163, 4167–4189, will take place at 11 o'clock, a. m. Inasmuch as the statute requires that, under such circumstances, "the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers, whenever practicable, or two discreet and experienced merchants, familiar with the character and value of the goods in question, to examine and appraise the same," we respectfully request that you will inform us of the names of the appraisers selected by you, under the foregoing provision, to re-appraise the goods now in question, in order that we may satisfy ourselves as to the qualifications of said appraisers under the law as above quoted.

Very respectfully, E. OELBERMANN & CO.

42 EXHIBIT A.

(Part IV, No. 29.) (No. 6193.)

Merchant Appraiser's Oath.

CUSTOM HOUSE, NEW YORK,
COLLECTOR'S OFFICE, *July*, 1879.

I, the undersigned, appointed by the collector of the district of New York to appraise a lot of silk and cotton velvets imported per steamship Rotterdam from Rotterdam, the importer having requested a new appraisement thereof, in accordance with law, do hereby solemnly swear diligently and faithfully to examine and inspect said said lot of silk and cotton velvets, and truly to report, to the best of my knowledge and belief, the actual market value or wholesale price thereof, at the period of the exportation of the same

to the United States, in the principal markets of the country from which the same was imported into the United States, in conformity with the provisions of the several acts of Congress providing for and regulating the appraisement of imported merchandise, so help me God.

L. M. BATES.

Sworn to and subscribed before me this 30th day of July, 1879.

W. A. SENN,
Collector.

EXHIBIT B.

(Substantially the same as Exhibit A.)

EXHIBIT C.

General Customs Regulations of 1874, *Art.* 426.

N. Y. Cat. No. 1162.

Duly paid June 19, 1879. No. 6192.

PORT OF NEW YORK,
GENERAL APPRAISER'S OFFICE, *September 4th*, 1879.

SIR: I have examined a lot of silk and cotton velvet in connection with A. P. Ketchum, G. A., imported by E. Oelbermann & Co., in the steamship Rotterdam, from Mülheim a Rhein, May 30, 1879, and do certify that, in my opinion, the actual market value or wholesale price of the said goods, at the period of the exportation thereof to the United States, in the principal markets of the country from which the same were imported into the United States, was, and I do therefore appraise the same, as follows:

Marks.	Numbers.	Description of merchandise.	Per metre marks.	Total value.
[W]	4153.62	Ten cases silk and cotton velvet.		
	4152.90	86947 15.9 89208 15.6 88676 15.5 88923 15.9		
		87603 14.1 499 15.7 033 15.2 89036 15.6		
		625 15.1 506 15.7 145 15.2 033 15.8		
		717 15.9 754 15.2 647 16.2 047 15.2		
		761 16.6 759 15.8 006 15.5 066 15.5		
		999 16.3 700 15.8 144 15.2 393 16		
		88011 14.7 88940 15.1 211 15.5 482 15.2		
		261 18.1 260 18.1 528 15.5 596 15.6		
		473 15.7 638 16.3 637 16.3 597 15.6		
		883 15.9 89489 15.8 899 15.4 87331 14.9		
		40 cartons velours chappe noir, 39 c'm. Metres. 628.30	2.20	1,381 60
44	4154	87621 15.1 89067 15.5 89392 16 89916 15		
		88076 15.2 095 15.1 470 15.7		
		428 14.7 209 15.6 492 15.8		
		40 cartons velours chappe noir, 39 c'm. Metres. 153.70	2.20	338 15

Exhibit C—Continued.

Marks.	Numbers.	Description of merchandise.	Per metre marks.	Total value.
		87689 14.7 87508 15.5 87908 17.6 89340 15.7 038 15.4 619 14 934 18.6 389 15.5 88238 14.8 810 16.4 949 16.2 390 15.5 489 14.2 814 15.1 89053 17.1 511 14.8 89213 15.2 88052 16.5 054 18.8 751 15.1 508 15.2 485 15.7 201 15.6 927 15.5 87224 15.4 487 15.5 315 16.2 269 18.1 686 15.9 339 15.6 30 cartons velours chappe noir, 39 c'm. Metres. 475.40	2.40	1,140 95
	4155	88308 15.5 88687 15.9 90441 15.2 90543 14.7 545 15.7 89748 16.2 91542 14.3 407 15.8 88935 18.6 90382 15.8 10 cartons velours chappe noir, 39 c'm. Metres. 157.70	2.40	378 50
		87878 14.7 93024 15.9 91863 15.1 93042 15.6 88909 17.6 92158 14.2 92875 14.4 296 15.5 91346 13.4 93332 14.9 876 14.3 85897 18.6 698 17.5 92641 19.5 896 15.8 86832 19 93242 18.3 93243 18.4 93011 15.1 93321 17.5 92136 15.6 91178 14.5 012 15.1 335 18.4 897 15.8 92909 13.4 016 15.5 93017 15.6 910 13.4 041 15.7 30 cartons velours chappe noir, 39 c'm. Metres. 478.30	2.50	1,195 75
45		85934 18 85935 18 86213 19.4 87736 20 40 c'm.		

	40 k.					
	83256 18.1 965 18.4	023 18.8∧	83821 18.4			
	8 cartons velours chappe noir, 39 and 40 c'm.		Metres. 149.10	2.60	387 65	
	Amount carried forward—marks				4,822 60	
	" brought " "				4,822 60	
	40 c'm. 40 c'm.	40 c'm.	39 c'm.			
4156	84072 19.1∧ 87633 18.8∧	87726 18.2∧	86623 18.4∧			
	86721 19.1 " 670 18 "	734 19.4 "	87549 19.2 "			
	87634 18.9 " 90438 18.8 "	91255 19.8 "	90651 19 "			
	39 c'm.					
	89940 18.9 " 87757 18.4 "	82781 18.9∧	85964 18.4 "			
	84408 19 " 86722 19.1 "	782 18.9 "				
	86016 19.8 " 87235 18.8 "	86622 18.4 "				
	22 pcs. velours chappe noir, 39 and 40 c'm.		Metres. 415.30	2.60	1,079 80	
	39 c'm. 40 c'm.	40 c'm.	40 c'm.			
	89879 18.7∧ 90436 19.8∧	92613 19∧	91254 19.8∧			
	90431 17.8 " 465 18.8 "	797 19 "	400 18.8 "			
	40 c'm.					
	425 19.1∧ 91163 17.9 "	798 19 "	92614 19 "			
	426 19.1 " 92082 18 "	981 19.8 "				
	15 pcs. velours chappe noir, 39 and 40 c'm.		Metres. 283.60	2.70	765 70	
46	39 c'm. 39 c'm.	40 c'm.	40 c'm.			
	91168 16.8∧ 92669 19 ∧	91818 18.9∧	81911 12.3∧			
	90372 18.6 " 93304 18.9 "	819 18.8 "				
	40 c'm.					
	500 19.2 " 91270 18.2∧	84741 19.6 "				
	10 pcs. velours chappe noir, 39 and 40 c'm.		Metres. 180.30	2.75	495 80	
4157	90156 15.8 87377 12.6	88758 14	91415 16.4			
	91377 15.2 86784 15.8	790 15.9	88881 16.3			
	89763 15.2 87344 15.6	89206 16	90224 13.7			

Exhibit C—Continued.

Marks.	Numbers.	Description of merchandise.	Per metre marks.	Total value.
		807 15.4 515 14.7 679 15.9 91191 15 84013 15.7 88387 14.5 90053 16 90015 14.9 86670 15.2 551 14.8 059 15.5 88013 15.4 87385 15.5 564 14.7 574 15 632 14.8 737 15.6 91396 15.8 30 pcs. velours chappe noir, 48 c'm. Metres. 456.70	3.15	1,438 60
		88355 14.2 86956 14 89422 15.6 91524 15.2 90283 15.2 957 14.4 863 15.2 525 16.5 88989 15.2 91394 15.5 10 pcs. velours chappe noir, 48 c'm. Metres. 151	3.30	498 30
	4158	87166 15.4 88752 16.6 91136 15.1 89263 16.2 799 15 89473 14.7 234 15.5 90628 12.1 88269 15.4 90900 15.5 472 14.9 91955 13.9 552 15.4 911 15.6 522 15.4 15 pcs. velours. chappe noir, 48 c'm. Metres. 226.70	3.30	748 10
47		90570 15.2 86769 15.2 89106 15.8 88270 16.8 936 15.6 87023 13.3 375 14.8 89429 16.6 88226 16.3 136 15.5 450 15.4 88688 16.3 84298 15.6 88040 16 90881 15.7 87930 16 85621 15.4 779 14.5 88153 15.7 89433 15.7 20 pcs. velours chappe noir, 48 c'm. Metres. 311.40	3.40	1,058 75

	87275 19.1 87435 14.7 910261/2 14.9 87041 15.4 87546 15			
	5 pcs. velours			
	chappe noir, 48 c'm.	Metres. 79.10	3.50	276 85
	Amount carried forward—marks			11,184 50
	" brought "			11,184 50
4159	92631 21.4 84962 21.4 84286 22.2 73274 21.8			
	78105 22.6 89663 21.4 78649 16.5			
	77012 22 83057 21.4 579 23.1			
	10 pcs. velours			
	chappe noir, 55 c'm.	Metres. 213.80	4.05	865 90
	84086 22.3 83668 20.4 90600 21 91452 22.2			
	80977 21.7 91086 21.7 85847 21.1 92624 20.3			
	8 pcs. velours			
	chappe noir, 55 c'm.	Metres. 170.7	4.20	716 95
48	87733 20.6 84269 20.5 80719 21.7			
	81301 19.6 92055 21.4 81216 21.1			
	6 pcs. velours			
	chappe noir, 55 c'm.	Metres. 124.90	4.40	549 55
4160	88922 15.9 86926 15.2 87288 16 88495 14.9			
	87876 15.5 930 16 514 15.5 87039 15.4			
	85932 15.6 87260 15.7 732 18.3 88467 15.8			
	12 pcs. velours			
	chappe noir, 39 c'm.	Metres. 189.80	2.30	436 55
	88179 15.2 88628 14.3 89093 15.2 89578 15.5			
	599 15.6 862 15 528 15.4			
	600 15.7 897 15.9 537 15.2			
	10 pcs. velours			
	chappe noir, 39 c'm.	Metres. 153.00	2.40	367 20
	88233 15.9 89549 15.4 91087 15.2			
	526 13.3 550 15.4 089 14.3			

Exhibit C—Continued.

Marks.	Numbers.	Description of merchandise.	Per metre marks.	Total value.
		89457 14.9 551 15.6 324 14.2 9 pcs. velours chappe noir, 29 c'm. Metres. 134.20	2.50	335 50
		87669 18 84628 18.9 87735 19.4 84627 18.9 87236 18.8 5 pcs. velours chappe noir, 40 c'm. Metres. 94.00	2.60	244 40
		83013 18.7 88119 18.2 87155 18.3 87183 18.4 4 pcs. velours chappe noir, 40 c'm. Metres. 73.60	2.70	198 70
49	4161	87605 15.6 88202 14.8 88617 15.8 88640 14.9 987 15.9 249 15.1 911 15.6 876 15.8 88890 17.2 396 15.2 912 15.7 901 16.2 630 15.5 544 15.7 89195 15.5 89198 15.9 85933 15.6 631 15.4 498 15.6 398 15.5 86919 14.2 89317 16.3 86951 15.2 497 15.6 87659 15.7 87457 16 87091 15.2 87982 15.6 699 15.2 715 15.8 207 15.5 88158 15.7 856 16.2 88196 15.1 34 pcs. velours chappe noir, 39 c'm. Metres. 529.80	2.35	1,245 05
		Amount carried forward—marks		16,144 30
		" brought "		16,144 30
	4162	87817 15.9 89520 14 88247 14.8 89777 16 88572 14.4 87309 14 89191 15 88585 14.2 89878 15.7 688 14 672 15.9		

		88478 15 88157 15 770 13.9				
		14 pcs. velours chappe noir, 39 c'm.		Metres. 210	2.40	504
		89475 15 91214 15.1 91328 15.6 89217 14.9				
		90373 15.8 327 15.7 88525 13.3				
		7 pcs. velours chappe noir, 29 c'm.		Metres. 105.40	2.50	263 50
50		39 c'm. 39 c'm. 40 c'm.				
		85575 18.1/\ 92980 18.8/\ 92983 18.2/\				
		89773 18.6 " 67725 18.3 40 c'm.				
		5 pcs. velours chappe noir, 39 and 40 c'm.		Metres. 92.10	2.60	239 45
		87154 18.3 87184 18.4 87947 18.8 88844 18.3				
		4 pcs. velours chappe noir, 40 c'm.		Marks. 73.80	2.70	199 25
		88864 18.2 40 c'm. 87742 19 39 c'm.				
		2 pcs. velours chappe noir, 39 and 40 c'm.		Metres. 37.20	2.75	102 30
		82230 17.30 89440 18.90				
		2 pcs. velours chappe noir, 39 c'm.		Metres. 36.20	2.95	104 80
		Marks				17,559 60
		Discount, 12½%				2,194 95
		Marks				15,364 65

Sept. 18, '79.
See order or report of general appraiser attached.—J. M.

L. M. BATES,
Merchant Appraiser.

EXHIBIT C [D].

General Customs Regulations of 1874, *Art.* 426.

(N. Y. Cat. No. 1162*b*.)

Duty paid June 19, 1879. No. 6193.

PORT OF NEW YORK,
GENERAL APPRAISER'S OFFICE, *October 4th*, 1879.

SIR: I have examined a lot of silk and cotton velvets in connection with A. P. Ketchum, G. A., imported by E. Oelbermann & Co., in the steamship Rotterdam, from Mülheim a Rhein, June 5, 1879, and do hereby certify that, in my opinion, the actual market value or wholesale price of the said goods, at the period of the exportation thereof to the United States, in the principal markets of the country from which the same were imported into the United States, was, and I do therefore appraise the same, as follows:

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
[W]	4163 4167 69	Twenty-four cases silk and cotton velvets.			
	4163	87166 16.6 88443 15.5 89938 14.7 89048 15 2 87208 15.5 345 15 666 16.7 90451 14.8 88193 15.4 ---- ---- Velours chappe noir, 39 c'm.	139.40	2.30	320 62
52		86902 15.7 89060 16.2 87226 15.4 082 18.6 704 15.8 117 15.7 81957 16.2 316 16.4 983 15.6 ---- ---- Velours chappe noir, 43 c'm.	145.60	2.40	349 44
		91213 15.1 87647 18.6 89029 15.4 660 18.6 90374 15.8 88183 19 684 21.3 89216 14.9 91922 18 ---- ---- Velours chappe noir, 39 c'm.	156.70	2.50	391 75

		89045 18.3	91880 15.7	Velours chappe noir, 39 c'm.	166.30	2.60	432 38	
		046 18.3	90670 19.1					
		90674 19.6	385 17.8					
		91500 19.5	92114 18.9					
		781 19.1	---- ----					
		83019 18.7	88298 18.7	Velours chappe noir, 39 c'm.	130.80	2.70	353 16	
		012 18.9	87077 18.2					
		018 18.7	88297 18.7					
		87271 18.9	---- ----					
		888663 18.2	90356 17.9	Velours chappe noir, 39 c'm.	129.60	2.75	356 40	
		845 18.2	357 17.9					
		90360 18.8	82075 19.1					
		88801 19 5	---- ----					
	4167	84046 19.5	88635 18.7	Velours chappe noir, 43 c'm.	168.70	2.75	463 92	
		091 18.3	89921 19.2					
		87218 18.9	84021 18.6					
		88400 18.6	87206 18.3					
		401 18 6	---- ----					
	53	89523 19	89541 18.2	Velours chappe noir, 43 c'm.	168.30	2.95	496 48	
		90398 18.7	885 18.6					
		92091 18.7	91939 18.3					
		88891 19	90026 18.8					
		892 19	---- ----					
		88116 18.1	99890 16	Velours chappe noir, 43 c'm.	83.20	3.05	253 76	
		86215 18.1	92976 15.2					
		83845 15.8	---- ----					
		86005 15.5	89573 15.9	Velours chappe noir, 43 c'm.	63	3.15	198 45	
		83820 15.7	574 15.9					
		90343 15.4	89332 15.6	Velours chappe noir, 43 c'm.	61.30	3 30	202 29	
		89311 15.2	91912 15.1					

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		89595 15.6 88598 15.2 Velours chappe noir, 43 c'm.	30.80	3.45	106 26
		Amount carried forward—marks			3,924 91
		" brought " "			3,924 91
	4168	87213 18.2 88429 18.9			
		~~468 18.7 420 18.9~~			
		88634 18.7 445 18.6 Velours chappe noir, 43 c'm.	168.40	2.75	463 10
		86075 17.6 879 19.5			
		87641 18.6 ---- ----			
54		89910 18.6 89909 18.6			
		964 17.6 963 17.6 Velours chappe noir, 43 c'm.	127.60	2.95	376 42
		91127 18 90389 18.6			
		98886 18.6 ---- ----			
		91976 18.4 91484 18.6			
		89530 18.4 89351 15.8 Velours chappe noir, 43 c'm.	121.30	3.05	369 96
		91485 18.6 922 15.6			
		83846 15.9 ---- ----			
		84527 15.8 89139 16.3			
		88090 15.2 923 15.6 Velours chappe noir, 43 c'm.	79.20	3.15	249 48
		84033 16.3 ---- ----			
		85802 15 83669 15.9			
		86745 14.9 90416 15.9 Velours chappe noir, 43 c'm.	77.90	3.30	257 07
		82788 16.2 ---- ----			
		86140 14.2 83805 14.7 Velours chappe noir, 43 c'm.	58.30	3.45	201 13
		88058 14.9 86147 14.5			

	4169	84090	18.8	89123	17.8	Velours chappe noir, 43 c'm.					168.50	2.75	463	37
		82653	18.3	90025	18.6									
		84287	18.6	84042	19.1									
		89329	19.5	289	18.3									
		330	19.5	----	----									
		91889	18.9	90940	19.2	Velours chappe noir, 43 c'm.					89.10	2.95	262	85
		89955	19	782	18.8									
		83658	13.2	----	----									
		87824	15.6	88903	15.8	"	"	"	"		31.40	3.05	95	77
		87084	15.1	88117	17.3	"	"	"	"		32.40	3.15	102	06
55		88220	16	89301	15.6	"	"	"	"		31.60	3.30	104	28
		80940	15.6	----	----	"	"	"	"		15.60	3.45	53	82
		87281	15.7	88577	14.3	Velours chappe noir, 48 c'm.					155.10	3.15	488	56
		427	15	380	14.4									
		778	14.4	574	15.6									
		923	19.1	575	16.7									
		88147	15.2	982	14.7									
		87767	16.3	90062	15.9	"	"	"	"		64.40	3.30	212	52
		88225	15.6	83959	16.8									
		84169	15.4	84887	14.7	"	"	"	"		30.10	3.40	102	34
		89786	15.2	89178	15	"	"	"	"		30.20	3.50	105	70
		87857	15.6	----	----	"	"	"	"		15.60	3.60	56	16
Dam.	4170	93424	18	----	----	"	"	brun, 45 c'm.			18	3.30	59	40
		92778	19.7	94190	18.7	"	"	"	"		57.10	3.15	179	86
		94189	18.7	----	----									

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		93137 18.3 92799 18.9 92491 17.9 800 19.1 93423 18 93136 18.3 92779 19.7 94479 18 93747 17.2 ---- ---- Velours chappe brun, 45 c'm.			
56		93320 17.2 ---- ---- 384 18.4 ---- ---- 682 18 ---- ---- 94255 18.1 ---- ---- Velours chappe marin, 45 c'm. " " prune " " " brun, " " " " "	238.60	3.30	787 38
		92490 18 94216 19 94217 19.1 93383 18.4 " " prune, "			
		93523 17.6 92951 16.2 94605 17.5 ---- ---- " " cardinal, "	182.30	3.40	619 82
		94264 18.1 ---- ---- 94412 19.2 94413 19.2 " " brun, " " " jaspe, "			
		Amount carried forward—marks			9,535 96
		" brought " "			9,535 96
Dam.	4171	94716 19.7 ---- ---- 93975 19.5 93976 19.5 Velours chappe marin, 39 c'm. " " " "	19.70 39	2.60 2.70	51 22 105 30
		93315 17.5 93722 18.9 94243 19.1 723 18.8 " " " "			
		92848 18.7 753 19.6 93455 19.4 ---- ---- 93334 18.8 ---- ---- " " brun, "	150.80	2.60	392 08

			93754	19.4	93362	18.3							
			770	19.2	363	18.3							
			94715	19.7	399	18.2							
			93314	17.6	400	18.2	"	"	marin, "		281.50	2.70	760 05
			754	19.6	771	19.2							
			94244	19	781	19.2							
			93700	18.2	782	19.2							
			701	18.2	----	----							
57	Dam.	4172	93604	18.1	----	----	"	"	grenat, 45 c'm.		18.10	3.30	59 73
			94096	18	----	----	"	"	marin, "		18	3.40	61 20
			92794	19.7	94258	18.7							
			895	18.1	93726	17.8							
			93416	18.4	865	19.2	"	"	" "				
			94614	18.1	94623	18.3							
			83319	18.7	----	----					278.60	3.30	919 38
			94276	18.8	94275	18.8	"	"	Rembrandt, 45 c'm.				
			93346	18.3	94199	18.7							
			94200	17.7	----	----	"	"	grenat, "				
			93733	17.5	94624	18.3							
			94355	17.8	93311	17	"	"	marin, "				
			259	18.7	----	----					125.90	3.40	428 06
			92767	18.3	92778	18.3	"	"	Rembrandt, "				
	Dam.	4173	93634	18.6	94459	18.8	"	"	brun, 39 c'm.		37.40	2.60	97 24
			94339	19.2	93845	18.9							
			94208	17.9	94338	17.4	"	"	prune, "				
			93872	18.6	93873	18.6							
			92853	18	----	----	"	"	jaspe, "				
58			93087	18.1	94237	18.7					279.10	2.60	725 66
			088	18	238	18.7							
			107	19.5	458	19	"	"	brun, "				
			108	19.4	----	----							
			94218	19.1	----	----	"	"	Rembrandt, "				

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		94060 19.4 93101 17.5 93333 18.8 94061 19.2 93100 17.5 ---- ---- Velours chappe brun, 39 c'm.	184.70	2.70	498 69
		92811 18.7 94207 18.1 93844 18.8 92810 18.7 " " prune, "			
		92854 18 ---- ---- " " jaspe, "			
		Amount carried forward—marks			13,634 57
		" brought " "			13,634 57
Dam.	4174	93404 18.3 ---- ---- Velours chappe saphir, 39 c'm.	18.30	2.60	47 58
		93403 18.3 92823 18.8 93450 18.7 ---- ---- " " " " Rembrandt, "	55.80	2.70	150 66
		92838 19.4 92454 19.6 " " saphir, "			
		93210 17.6 ---- ---- " " Rembrandt, "	56.60	2.60	147 16
		92822 20.7 92453 19.4 824 18.8 93324 19.7 " " saphir, "			
		93209 17.6 94219 19.1 449 18.7 ---- ---- " " Rembrandt, "			
		94323 19.1 94418 17.2 324 19.1 94419 17.2 " " grenat, "	258.70	2.70	698 49
		93751 19.1 94281 16.5 94280 16.5 ---- ---- " " cardinal, "			

59	4175	87667 18.7	88886 18.3	Velours chappe noir, 43–44 c'm.					
		82669 19.1	888 19.2						
		83048 15.1	89122 17.8						
		713 18.4	381 18.6						
		84047 19.5	493 18.9						
		605 19.2	524 19						
		16825 19.1	540 18.2						
		88692 18.3	86094 19.2						
		693 18.3	857 18						
		887 19.2	84092 18.4						
		89956 19	86095 19.2						
		531 18.1	90404 19.6						
		91888 18.7	92080 18.6	"	"	"	"	227.10	2.95	669 95
		90390 18.6	89601 19.2						
		729 18.3	91514 19.7						
		730 18.3	515 19.8						
	4176	89602 19.2	84290 18.4						
		84234 18.9	90941 19.2	"	"	"	"	152.10	2.95	448 70
		493 18.6	83719 19.4						
		83966 19.7	90340 18.7						
		89834 17.9	92977 15.9						
		90341 18.7	90949 15.1						
		91797 18.8	91796 18.8						
		977 18.3	84528 15.9	"	"	"	"	247.80	3.05	755 79
		84517 15.9	86004 15.5						
		87085 15.1	87212 15.5						
		88904 15.8	88089 15.2						
		92975 15.4	---- ----						
60		84558 15.2	88113 18.1	"	"	"	"	65.20	3.15	205 38
		85877 15.6	89138 16.3						
		85876 15.4	86848 15.1						
		84180 15.2	88064 15.1	"	"	"	"	90.90	3.30	299 97
		695 15.1	134 15.1						

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
	4177	89713 17.8 86997 14.5 88831 14 87837 16.3 89237 15.7 89439 15.2 89237½ 15.7 90873 15.1 90851 15.7 89412 15.8 94220 16 92487 15.2 92689 13.7 487½ 15.1 407 15.8 625 15.9 432 14.8 990½ 14.9 4941½ 14.2 92482 18.1 793½ 16.2 ---- ---- Velours chappe noir, 48 c'm.	155.80	3.50	545 30
		" " " "	169.90	3.60	611 64
		Amount carried forward—marks			19,234 06
		" brought " "			19,234 06
	4177 (Continued.)	92522 15.8 92689½ 13.7 93990 14.7 890 14.8 Velours chappe noir, 48 c'm.	59.00	3.70	218 30
		90816½ 15.5 92560 15.2 91735½ 15.6 89420½ 15.9 93609 17.2 92890½ 14.7 92687 15.9 ---- ---- " " " "	110	3.80	418 00
	4178	89252 15.6 91201 16.3 90052 14.8 90504 13.2 182 16 91045 14.2 184 14.8 89210 15.1 910 15.9 ---- ---- " " " "	135.90	3.15	428 08
61		89059 14 86917 15.1 831 15.2 88951 15.8 90185 12.9 89655 18.7 256 13.2 ---- ---- " " " "	104.90	3.30	346 17

		91567	14.8	90758	16.6	"	"	"	"		78	3.40	265 20
		450	15.4	89624	15.4								
		90936	15.8	----	----								
		86968	15.2	86229	15.7	"	"	"	"		61.80	3.50	216 30
		88342	15.1	88339	15.8								
		90860	15.7	92947	15.2	"	"	"	"		62.30	3.60	224 28
		92674	15.7	94587	15.7								
		88775	15.2	88775½	14.4	"	"	"	"		29.60	3.80	112 48
		92692½	15.6	92662	15.4	"	"	"	"		31	3.95	122 45
		92325	15.5	93203½	15.4	"	"	"	"		39.90	4.15	128 23
		92684	14.9	92684½	14.7	"	"	"	"		29.60	4.40	130 24
		76796	21.8	----	----	"	"	"	55 c'm.		21.80	4.05	88 29
		78024	21	----	----	"	"	"	"		21	4.20	88 29
		82180	21.5	92759	16.8	"	"	"	65 c'm.		80.80	4.90	395 92
		92748	20.7	93710	21.8								
		79004	21.1	82148	20.7	"	"	"	"		41.80	5.15	215 27
		90071	20.4	----	----	"	"	"	"		20.40	5.35	109 14
		91974	22	----	----	"	"	"	"		22	5.60	123 20
62	4179	87117	16.7	87731	18.3	"	"	"	39 c'm.		81.10	2.20	178 42
		645	15.4	739	15.5								
		615	15.2	----	----								
		83101	18.6	90320	18.2	"	"	"	"		183.70	2.70	495 99
		87962	16.3	464	18.9								
		89994	18.4	91256	19.9								
		91850	17.4	257	20								
		90019	18	92083	18								

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		92183 14.5 86568 18.3 87754 18.1 855 17.8 83533 19 87701 18.7 84687 19 89168 19.4 85864 15.9 82104 18.4 Velours chappe noir, 39 c'm.	179.10	2.95	528 35
		Amount carried forward—marks			24,066 57
		~~Amount brought forward—marks~~			~~24,066 57~~
	4179 (Continued.)	81998 18.9 84420½ 15.9 76883 16.4 88167 15.2 85936 15.4 77409 17 74756 18.3 76247 18.4 76271 15.9 89154 15.7 Velours chappe noir, 48 c'm.	167.10	3.15	526 36
		75998 15.6 90575 14.4 77779 18.1 760 15 88080 16.4 89792 15.2 139 15.5 80882 14.3 89104 15.9 617 14.8 " " " "	155.20	3.30	512 16
		91564 15.2 89357 15.9 89231 15.1 413 14.8 267 15 87449 15.6 92986 14.2 89367 16 88333 14.8 87146 16.4 " " " "	152.40 153	3.50	535 50
62		90300 15.1 89612 15.6 292½ 15.7 83033 16.4 82793 16.3 ---- ---- " " " "	179.10	3.80	300 58

	4180	89353	21.8	92375	21					
		90416	22.1	556	21.1					
		487	21.7	93061	20.5					
		81922	22.7	264	21.4	" " " 65 c'm.	281.20	4.90	1,377 88	
		87464	22.7	466	21					
		88947	21.9	83843	21.1					
		91975	22.2	----	----					
		85704	20.6	87402	21.5					
		87528	21.4	84895	19					
		83771	21.1	88517	21.2	" " " "	169.40	5.15	872 41	
		84068	21.9	89356	22.7					
	4181	88242	20.4	93075	20.9					
		722	18.6	92658	20					
		92704	22.2	93124	20.9	" " " "	144.70	5.35	774 14	
		705	21.7	----	----					
		92022	20.7	91688	21.3					
		89662	21.9	92703	21.9	" " " "	106.70	5.60	597 52	
		847	20.9	----	----					
		76978	21.2	90329	22	" " " "	65.10	6.25	406 87	
		82932	21	----	----					
64		82189	20.9	88996	19.6	" " " "	61.90	6.70	414 73	
		88272	21.4	----	----					
	4182	87993	15.4	89112	14.7					
		88370	15.9	287	15.6	" " " 47–48 c'm.	76.80	3.30	253 44	
		764	15.2	----	----					
		84306	15.8	87311	16.2	" " " "	63.60	3.40	216 24	
		86649	15.7	378	15.9					
		87909	15	91150	15.2	" " " 48 c'm.	62	3.50	217	
		89427	16.4	88771	15.4					
		81003	15.2	83288	14.4	" " " "	59.60	3.60	214 56	
		91383	15.1	82422	14.9					

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		91959 14.8 91959½ 15.1 Velours chappe noir, 48 c'm.	29.90	3.95	118 11
		81123 15.4 78499 15.4 } " " " " 85746 15.7 93203 15 }	61.50	4.40	270 60
		79174 14.9 79067 15.2 " " " "	30.10	4.60	138 46
		77906 16 88958 21.1 " " " 55 c'm.	37.10	4.05	150 25
		87448 20.9 92701 19.6 " " " "	40.50	4.20	170 10
		77737 20.7 87871 21.3 " " " "	42	4.40	184 80
		84957 21.2 88241 21.5 } 87098 22.5 83667 20.7 } " " " 65 c'm. 84580 20.9 90928 21.7 }	85.90	4.90	420 91
		87492 21.5 856 22 " " " "	86.10	5.15	443 41
		94355 21.5 94564 20.4 " " " "	41.90	5.35	424 16
		Amount carried forward—marks			33,406 76
		" brought " "			33,406 76
65	4183	91217 16.2 90710 15.2 } 90086 15.9 91218 16.2 } 91004 14.9 350 15.7 } Velours chappe noir, 39 c'm. 89768 14.2 505 15.5 } 848 16.3 539 16.2 }	156 30	2.30	359 49
		90008 19.1 90685 21.3 } 542 14.7 91013 15.4 } " " " " 91305 15.1 293 14.8 } 88578 15.7 584 15.4 }	131.50	2.40	315 60

		83139	18.1	82820	18.1								
		84122	17.6	87193	18.8	"	"	"	"		91.80	2.60	238 68
		87050	19.2	----	----								
		90268	18.6	88866	18.8								
		86748	18.4	90267	18.6	"	"	"	40 c'm.				
		88234	17.4	----	----						110.40	2.70	298 08
		86618	18.6	----	----	"	"	"	39 c'm.				
		91399	18.8	90842	18.6	"	"	"	40 c'm.				
		91271	18.2	----	----						73.40	2.75	201 85
		88930	17.8	----	----	"	"	"	39 c'm.				
		89819	18 4	----	----	"	"	"	41-42 c'm.		18 40	3.55	65 32
66		88535	15.6	75778	18.8								
		90095	21.7	86298	15.6	"	"	"	48 c'm.		88.10	3.15	277 51
		89539	16.4	----	----								
		87411	15 6	90569	14.4	"	"	"	"		58.50	3.30	193 05
		88736	14.9	698	13.6								
		88287	15.1	88965	15.1	"	"	"	"		44.70	3.50	156 45
		719	14.5	----	----								
		88651	15.2	88976	15.5	"	"	"	"		30.70	4.40	135 08
		80099	14.4	----	----	"	"	"	"		14.40	4.90	70 56
	4184	94382	17.6	91807	15.9	"	"	"	"		49.50	3.75	185 62
		89371½	16	----	----								
		88811	14.1	92241½	15.1								
		641	15.7½	93115½	15.2	"	"	"	"		118.80	3.95	469 26
		89420	15.5	275	14.4								
		92241	14.5	785½	14.3								

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		87110 14.4 88290 15.4 89696 15.9 90092 15.1 86853 15.2 91828 14.5 87478 15.9 ---- ---- Velours chappe noir, 48 c'm.	106.40	4 40	468 16
		78736 15.2 80543 15.6 79968 15.5 706 14.7 80402 15 88853 14.7 " " " "	91.70	4.60	421 82
		82822 15 84147 16 822½ 15 242 16.4 86856 20 ---- ---- " " " "	82.90	4.40	364 76
67		60299 15.5 86218 15.7 71147 22 87943 15.6 83512 16.5 ---- ---- " " " "	85.30	5.05	430 76
		Amount carried forward—marks			38,058 81
		" brought " "			38,058 81
	4185	92702 21.5 93597 21.3 Velours chappe noir	42.80	5.15	220 42
		98379 21.5 77735 19.2 79238 22.7 78044 17.6 89417 20.9 87707 21.2 670 20.9 84215 21.3 87808 21 ---- ---- Velours chappe noir, 65 c'm.	188.30	5.35	996 70
	4186	82226 22.7 87293 20.5 81654 20.7 88999 19.6 82373 21.1 91569 20.7 " " " 60 c'm.	125.30	4.65	582 64

			80094	20.9	79188	21.5	"	"	"	"		86.80	4.80	416 64
			81265	22.3	81773	22.1								
			82796	22	91649	21	"	"	"	65 c'm.		64.20	5.15	330 63
			743	21.2	----	----								
			78029	21.5	83834	21.9								
			179	22.5	84136	21	"	"	"	"		100.70	5.35	570 67
			82832	21.8	----	----								
68	Dam.	4187	92362	26.6	----	----	"	"	"	48 c'm.		26.60	3.30	87 78
	"		93959	31.6	92419	32	"	"	"	"		63	3.40	316 20
	"		95178	29.4	----	----								
			92936	31.7	95109	30.1								
			94073	31.7	93995	32.3								
			178	31.3	676	30.8	"	"	"	"		309.50	3.15	974 92
			781	30.4	95076	30.4								
			95188	30.6	168	30.2								
			93746	28.8	93817	30.8	"	"	"	"		118.40	3 30	390 72
			92533	28.8	94414	30								
			91587	30.8	95026	31.6								
			94408	31.9	93468	30	"	"	"	"		156	3.40	530 40
			317	31.7	----	----								
			94641	30.2	----	----	"	"	"	"		30.20	3.50	105 70
		4188	94611	32.4	94627	30.3								
			92739	31.6	913	32.4	"	"	"	"		158.40	3.15	498 96
			93980	31.6	----	----								
			94371	31	93546	30.6								
			363	32.5	94549	31.9	"	"	"	"		157.90	2.30	521 07
			93277	31.9	----	----								

Exhibit C [D]—Continued.

Marks.	Numbers.	Description of merchandise.	Metres.	Per metre.	Total value.
		93917 31 92995 31.7 898 31.7 93922 33.9 95159 30.7 937 31.4 215 30.1 95194 31.3 227 31 ---- ---- Velours chappe noir, 48 c'm.	282.80	3.40	981 52
		93288 28.5 93422 29.1 94454 32.4 94462 31 " " " "	121	3.50	423 50
69	4189	89362 18.4 ---- ---- " " " 39 c'm.	18.40	2.50	46
		88379 13.3 ---- ---- " " " 48 c'm.	13.30	3.15	41 89
		970 14.5 ---- ---- " " " "	14.50	3.30	47 85
		322 15.2 ---- ---- " " " "	15.20	3.50	53 20
		92898½ 15.1 ---- ---- " " " "	15.10	3.80	57 38
		91443 14.9 ---- ---- " " " "	14.90	4.40	65 56
		94082 14.2 ---- ---- " " " "	14.20	4.90	69 58
		76447 17.2 ---- ---- " " " "	17.20	5.60	96 32
		293 18.1 ---- ---- " " " "	18.10	5.90	106 79
		78726 21.3 ---- ---- " " " 60 c'm.	21.30	4.80	102 24
		81046 21.5 ---- ---- " " " "	21.50	5.15	110 72
		89783 22.1 ---- ---- " " " 65 c'm.	22.10	6.25	138 12
		94771 19 93830 19.7 95092 18.9 740 18.2 92555 18.2 94622 16.8 95252 18.8 367 19.2 225 18.9 95144 19.7 94631 19.2 94546 19.6 " " " 49 c'm.	226.20	4.90	1.108 38
		Amount carried forward—marks			48,031 31
		" brought " "			48,031 31

70 Allowance for imperfections on the following Nos.:

			Marks.	
4170, 93424	10%	on	54	5.40
4171, 94716, 90975, 976	"	"	144.60	14.50
4172, 93604, 94096	"	"	110.10	11.
4173, 93634, 94459	"	"	89.80	9.
4174, 93404, 403, 92823, 93450	"	"	183.40	18.30
4187, 92362, 93959, 95178, 92419	"	"	368.10	36.80
				95
Marks				47.936.31
Discount, 12½%				5.992.04
Marks				41.944.27

Oct. 7, '79. See order on report of gen'l appraiser attached.
L. M. BATES,
Merchant Appraiser.

71 (Endorsed:) U. S. circuit court. Emil Oelbermann & others against E. A. Merritt. Bill of exceptions. Chamberlain, Carter & Hornblower, attorneys for appellants, 346 Broadway, N. Y. U. S. circuit court. Filed May 3, 1884. Timothy Griffith, clerk.

72 Supreme Court of the United States.

EMIL OELBERMANN, LOUIS F. DOMMERICH and HUGO PEIPERS,
Plaintiffs in Error,
against
EDWIN A. MERRITT, Defendant in Error.

Afterwards, to wit, on the second Monday of October, in the same term before the Justices of the said Court at the Capitol in Washington, came the said plaintiffs in error by Chamberlain, Carter & Hornblower, their attorneys, and say: that in the record and proceedings aforesaid there is manifest error, in this, to wit, that by the record aforesaid it appears that the judgment aforesaid, in form aforesaid given, was given for the said defendant in error
73 against the said plaintiffs in error, whereas by the law of the land, the said judgment ought to have been given for the said plaintiffs, against the said defendant.

And the said plaintiffs pray that the judgment aforesaid, for the error aforesaid and other errors in the record and proceedings aforesaid, may be reversed, annulled, and altogether held for nothing, and that they the said plaintiffs may be restored to all things which they have lost by occasion of said judgment, &c.

CHAMBERLAIN, CARTER & HORNBLOWER,
Attorneys for Plaintiffs in Error,
346 *Broadway, New York City.*

Endorsed: U. S. Supreme Court. Emil Oelbermann, & others, ag't Edwin A. Merritt, assignment of erros. Chamberlain,
74 Carter & Hornblower, attorneys for plaintiffs in error, 346 Broadway, N. Y.

I hereby admit due and timely service of a copy of the within. Dated New York, M'y 29th, 1884. Elihu Root, attorney for defendant in error. U. S. circuit court. Filed May 29th, 1884. Timothy Griffith, clerk.

75 Supreme Court of the United States.

EMIL OELBERMANN, LOUIS F. DOMMERICH & HUGO PEIPERS, Plaintiffs in Error,

vs.

EDWIN A. MERRITT, Defendant in Error.

And afterwards, to wit, on the second Monday of October, in the year one thousand eight hundred and eighty-four, the said defendant in error by Elihu Root, his attorney, comes here into Court and says that there is no error, either in the record or proceedings aforesaid, or in the giving of the judgment aforesaid.

And he prays that the said Supreme Court, before the justices thereof now here, may proceed to examine as well the record
76 and proceedings aforesaid as the matters aforesaid, above assigned for error, are that the judgment aforesaid in form aforesaid given, may be in all things affirmed, &c.

ELIHU ROOT,
Attorney for Defendant in Error.

Endorsed: U. S. Supreme Court. Emil Oelbermann & *al.*, pl'ffs in error, *versus* Edwin A. Merritt, def't in error. Joinder in error. Elihu Root, United States attorney, attorney for defendant in error. Due service of a copy of the within is hereby admitted. Chamberlain, Carter & Hornblower, New York, M'y 29, 1884. U. S. circuit court. Filed May 29th, 1884. Timothy Griffith, clerk.

77 *Bond for Damages and Costs.*

Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

EMIL OELBERMANN, LOUIS F. DOMMERICH, & HUGO PEIPERS

vs.

EDWIN A. MERRITT.

Know all men by these presents, that we, W. Uhlenbrock, of 253 W. 132 st., New York, and H. C. Henrier, of 328 Clinton st., Brooklyn, are held and firmly bound unto the above named Edwin A. Merritt, in the sum of five hundred dollars, to be paid to the said Edwin A. Merritt, for the payment of which well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated the 24th day of May, in the year of our Lord one thousand eight hundred and eighty-four;

Whereas, the above-named Emil Oelbermann, Louis F. Dommerich, & Hugo Peipers have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York;

Now, therefore, the condition of this obligation is such, that if the above-named Emil Oelbermann, Louis F. Dommerich, & Hugo Peipers shall prosecute their writ of error to effect, and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

W. UHLENBROCK. [L. S.]
H. C. HENRIER. [L. S.]

Sealed and delivered, and taken and acknowledged this 24th day of May, 1884, before me.

[L. S.] JAMES BYRNE,
Notary Public, New York Co.

78 UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

W. Uhlenbrock and H. C. Henrier, being severally duly sworn, depose and say, each for himself, that he is a resident of New York State, and a house-holder therein; that he is worth the sum of one thousand dollars over and above all his just debts and liabilities.

W. UHLENBROCK.
H. C. HENRIER.

Sworn to this 24th day of May, A. D. 1884, before me.

[L. S.] JAMES BYRNE,
Notary Public, New York Co.

[Endorsed:] U. S. circuit court. Emil Oelbermann *et al. vs.* Edwin A. Merritt. Bond for costs on writ of error to U. S. Supreme Court. Chamberlain, Carter & Hornblower, pl'ffs proctors, 346 Broadway, New York city. Approved as to form and sufficiency of sureties. May 28th, 1884. Alfred C. Coxe. U. S. circuit court. Filed May 28, 1884. Timothy Griffith, clerk.

79 UNITED STATES OF AMERICA, ss:

To Edwin A. Merritt, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October, eighteen hundred and eighty-four, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Emil Oelbermann, Louis F. Dommerich and Hugo Peipers are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned

should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated, May 28, 1884.

ALFRED C. COXE.

[Endorsed:] 6615. U. S. Supreme Court. Emil Oelbermann, Louis F. Dommerich and Hugo Peipers, plaintiffs in error, against Edwin A. Merritt, defendant in error. Citation.

Due service of a copy of the within citation is hereby admitted this 29 of May, 1884.

ELIHU ROOT,
Attorney for Defendant in Error.

[Stamped:] U. S. circuit court, filed May 29, 1884. Timothy Griffith, clerk.

Endorsed on cover: S. New York, C. C. U. S. No. 322. Emil Oelbermann, Louis F. Dommerich & Hugo Peipers, plaintiffs in error, *vs.* Edwin A. Merritt, late collector of the port of New York. Filed 27th September, 1884.

123-356
123-356

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1886.

No. 322.

EMIL OELBERMANN, LOUIS F. DOMMERICH AND HUGO PEIPERS,

Plaintiffs in Error,

vs.

EDWIN A. MERRITT, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS IN ERROR.

D. H. CHAMBERLAIN,
W. B. HORNBLOWER,
EUGENE H. LEWIS,
Counsel for Plaintiffs in Error.

BURGOYNE'S "Quick" Print, COR. WALKER AND CENTRE STS., N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1886.

No. 322.

EMIL OELBERMANN, LOUIS F. DOMMERICH and HUGO PEIPERS,
Plaintiffs in Error,

AGAINST

EDWIN A. MERRITT, Late Collector of the Port of New York.

Points for Plaintiffs in Error.

Statement.

This is a writ of error to the Circuit Court of the United States for the Southern District of New York.

In that Court a verdict was found in favor of the defendant by direction of the Court, the trial having been held at a Circuit Court before Honorable Hoyt H. Wheeler and a jury.

The facts which are material to the points raised in this Court are the following :

In June, 1879, the plaintiffs were consignees of 34 cases of velvets imported in two different invoices, from Mülheim, Germany. The velvets were entered at the Custom House in New York, in one entry on June 19th, 1879, and duties were paid on that day by the plaintiffs at the

legal rate of 60% *ad valorem*, amounting to $7,750.80. Two cases from one of the invoices, and three cases from another, were designated by the Collector for examination and sent to the Public Store, where after examination the appraiser raised the value of the merchandise more than 10% above the value of the same as entered by the plaintiffs. The plaintiffs then gave the usual notice of dissatisfaction calling for a reappraisement, and the Collector appointed Levi M. Bates, a merchant of New York City, to be associated with A. P. Ketchum, General Appraiser, in examining and appraising the velvets according to law. The merchant appraiser subscribed to and made the usual oath "to diligently and faithfully examine and inspect the velvets and to report to the best of his knowledge and belief the actual market value or wholesale price thereof, &c., &c." The Merchant and General Appraisers subsequently disagreed and made separate reports of their appraisement to the Collector, who thereupon decided between them and adopted the report of the General Appraiser and levied regular duties upon the velvets on the basis of value fixed by the re-appraisement report adopted by him. The total entered value of the merchandise was $12,918, and the total appraised value, after re-appraisement, was $15,554. The entered value having been advanced in both invoices more than 10 per cent., the Collector liquidated the regular 60% duty upon the advanced valuation at $9,322.40, and levied, in addition to the regular duty, an additional or penal duty of 20% upon the advanced value of the merchandise, amounting to $3,110.80.

The plaintiffs paid these regular duties as liquidated, and also the additional duties, and afterwards duly protested in writing against such payments, and duly appealed from the imposition of the same to the Secretary of the Treasury, and duly brought this action to recover the excess of duties as liquidated and levied after such reappraisement.

In addition to urging at the trial the recovery of the entire excess of duties upon the ground of fatal irregularity in the reappraisement, the plaintiffs also urged the recovery of different portions of the excess on grounds applicable to each separately.

The principal issues of fact raised by the pleadings and protest were:

(*a*) Was the merchant selected by the Collector as merchant appraiser "a discreet and experienced merchant familiar with the character and value of the goods to be appraised?"

(*b*) Did the merchant appraiser make the examination of the merchandise required by law?

At a former trial of this action before Honorable ALFRED C. COXE, sitting in the Circuit Court, with a jury, the testimony of Mr. Bates, the merchant appraiser, was offered by plaintiffs and received to disprove these propositions, and upon submission to the jury, a verdict was rendered for the plaintiffs. Thereafter a motion was made for a new trial before Judges COXE and SHIPMAN, sitting in the Circuit Court, and a new trial was granted which resulted in the judgment which comes here for review. The opinion of the Court granting the new trial was written by Judge COXE, and is reported in 22 Blatchford's Reports, p. 41.

Assignments of Error.

1. The Court below erroneously refused to admit the testimony of the witness, Bates, as to his own qualifications for the position of merchant appraiser (fols. 23–25).

2. The Court below erroneously refused to admit in evidence the letter addressed by the plaintiffs to the defendant dated July 28, 1879 (fols. 21, 29, 41).

3. The Court below erroneously refused to admit the testimony of the witness, Bates, as to the extent and character of the examination by him of the merchandise under appraisement (fols. 26–28).

4. The Court below erroneously refused to admit the evidence of the witness, Bates, as to whether the importers or either of them was present at the reappraisement or examination of the merchandise.

5. The Court below erroneously refused to direct a verdict in favor of the plaintiffs for the sum of $4,925.14, with interest at the rate of six per cent. from the 26th day of September, 1880, the date of protest, such sum being made up of $1,581.60, being sixty % duty on the excess of the appraised value of the merchandise over the entered value, and $3,110.80 being the additional duty of twenty % upon the entire appraised value of the merchandise and $232.74 being the regular sixty % duty on the charges and commissions as stated in the entered value of the merchandise (fol. 30).

6. The Court below erroneously refused to direct a verdict in favor of the plaintiffs for $3,110.80, the penalty or additional duty of 20% upon the appraised valuation of the merchandise (fol. 31).

7. The Court below erroneously refused to direct a verdict in favor of the plaintiffs for $361.75, being the regular duty of 60% and the additional duty of 20% upon the sum of $452.19, total amount of charges and commissions (fol. 31).

8. The Court below erroneously refused to direct a verdict in favor of the plaintiffs for $90.44, being the additional duty of 20% upon the charges and commissions (fol. 31).

POINTS.

I.

The first issue of fact plainly tendered by the pleadings and by the plaintiff's protest is that as to the legal qualification of the merchant appraiser.

Was Mr. Bates such a person as is contemplated by the statute? Were the reappraisement proceedings fatally irregular by reason of the appointment of a merchant appraiser not qualified in the manner prescribed by law to act?

It is submitted that these questions presented material issues, and that if they were properly supported by proof, it should have been submitted to the jury to pass upon them.

§ 2930 of the U. S. Revised Statutes prescribes as follows:

> "If the importer, owner, agent or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which *the collector shall select one discreet and experienced merchant* to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, *citizens of the United States, familiar with the character and value of the goods in question*, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly."

The notice of dissatisfaction given by the importer within the proper time effectually nullifies the *ex parte* appraisement with which he is dissatisfied, and gives the importer an absolute right to a reappraisement, and in default of one's being furnished by the Govern-

ment, restores the entered value of the merchandise, as its dutiable value.

Burgess vs. Converse, 2 Curtis C. C., 220.

But the finding of the reappraising Board in order to be effectual must have been rendered by a legally constituted Board, and if the law is not complied with in its organization, then its report can be of no legal validity and, therefore, of no binding force.

Thus, if the collector should appoint as merchant appraiser a citizen of France or Germany, it can hardly be doubted that the Board would be illegally constituted. It can hardly be less so if the collector should appoint to the same office a discreet and experienced *mechanic* instead of *merchant*, or if the merchant whom he should appoint were "familiar" only "with the character and value" of *leather hides* instead of *velvets*.

In the case of *Burgess vs. Converse*, 2 Curtis C. C., 217, objections seem to have been raised to the qualifications of the appraisers, but the Court was of the opinion that that ground was not open to the plaintiffs under their protest.

In the case of *Fallock vs. Burney*, 5 Blatch., 38, the protest raised the point that the person, who acted as merchant appraiser, was not a discreet or experienced merchant within the true intent and meaning of the Act of Congress, but the Court held that the importer should have made known his objections to the appraiser at the hearing, and that the objection came too late.

In the case of the *United States vs. Earnshaw*, 12 Fed. Rep., 283, before Judge BROWN in the U. S. District Court for the Southern District of New York, the action was to recover duties assessed by the collector

upon imported merchandise, after their liquidation following a reappraisement. The answer of the defendant set up the disqualification of the merchant appraiser, but it appeared that he had neither protested nor appealed to the Secretary of the Treasury. It was, therefore, held that under § 2931 of the U. S. Revised Statutes the liquidation must stand.

In the case of *Passavant vs. Merritt*, tried before Judge SHIPMAN, in the U. S. Circuit Court for the Southern District of New York, in May, 1882, the learned judge submitted to the jury the question whether Mr. Buckley, the merchant appraiser, appointed by the Collector, sufficiently answered the requirements of the law in being a discreet and experienced merchant, familiar with the character and value of the goods to be appraised.

In the case which is here, the protest and appeal were duly taken; the suit was duly brought; the protest clearly showed the ground of objection insisted upon; the record shows the efforts made by the importers to learn the name of the merchant appraiser in order to judge of his qualifications, as well as the efforts made by the importers to show the concurrence of both merchant appraiser and the importers in the protest against the former's qualifications to act as merchant appraiser.

II.

Another material issue of fact was tendered by the protest and pleadings and was sought to be supported by evidence which was excluded, viz.; the question whether the merchant appraiser sufficiently *examined* the merchandise under appraisment to comply with the positive requirements of law. (Record, fol. 26).

There can be no doubt under the authorities of the *materiality* of this issue.

U. S. Rev. Stats., §§ 2901, 2902, 2930.
Treasury Regulations, 1874, Arts. 406, 409.
Greely vs. Thompson, 10 How. U. S., 225.
Greely vs. Burgess, 2 Curtis, 216, S. C., 18 How. U. S., 413.
Passavant vs. Merritt, Actions Nos. 1 and 2, (unreported).

Section 2901 of the U. S. Revised Statutes, reads thus:

"The collector shall designate on the invoice at least one package of every invoice, and *one package at least of every ten packages* of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, *to be opened, examined and appraised*, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to seizure and forfeiture on conviction thereof before any Court of competent jurisdiction; but if the appraiser shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended."

In the case of *Greely vs. Thompson, supra*, only one of the merchants, who acted as merchant appraisers, ever saw the merchandise which was the subject of the invoice.

Upon the trial before Mr. Justice WOODBURY, and a jury, the Court charged that if both appraisers, did not make some personal examination of the iron, *their report or decision was not made in conformity to law*, and did not justify the penalty.

Upon appeal to the Supreme Court, the same learned Justice delivered the opinion and said :

> * * * "Those acts (Acts of Congress) expressly require that the appraisers should inspect or examine a portion of the goods pointed out by the Collector. * * * Besides this, it would be unreasonable to overturn the invoices and oaths of importers, unless by a personal inspection and examination."

In the case of *Greely vs. Burgess, supra*, the importer protested against the payment of duties assessed, on the ground that the goods were not fairly and faithfully examined by the appraiser.

The plaintiffs further offered to prove, under said protest, that the merchant appraisers did not examine or see any of the original packages of the merchandise in question, and only saw samples which had been taken on the 26th of April, 1850, from one in ten of the packages described in the invoice, and that such samples so drawn and exposed to the air would not afford a fair criterion by which to judge of the importation, and claimed the right to go behind the return of the said merchant appraisers, on the ground that they had not examined the cigars as required by law, and to put it as a question of law to the jury without alleging fraud.

The defendant objected to the admission of such evidence to go to the jury in the absence of fraud on the part of the appraisers, and claimed that their decision was *in the nature of an award, and final under the statute, and not open under this protest.*

The Circuit Court ruled the evidence admissible, and that the plaintiffs might go to the jury on the facts, whether the examination made by the merchant appraisers was, in substance and effect, equivalent to an examination of one package in ten of the importation, and if it was not the appraisement was void.

The case thereupon came before the Supreme Court, and this Court, per CAMPBELL, J., after setting

forth the different acts of Congress on the subject, say :

* * * "These Acts of Congress provide for the appointment, regulate the duties, and impose the limitations on the authority of the appraisers, *and determine the conditions on which the validity of their assessment depends.* All their powers are derived from these acts, and it is their duty to observe the restrictions and to obey the directions they contain. In the present instance there was a neglect of the positive mandate 'to open, examine and appraise one package of every invoice, and one package, at least, of every ten packages of goods, wares and merchandise,' and the jury have found that the inquiry they made was not, in substance nor in effect, an equivalent for such an examination."

In the case of *Passavant vs. Merritt*, tried in this Court in November, 1881, the same issue was raised by the pleadings and submitted to the jury.

Says Judge SHIPMAN in his charge to the jury :

* * * "The ground which has been insisted upon in this suit for recovery is, that there was no examination or no sufficient examination of the goods in question by Mr. Friedman, one of the appraisers, and that, gentlemen, is the only question before you. * * * The question is simply as I before stated, whether Mr. Friedman, the merchant appraiser, made an examination of the goods, or a sufficient examination. * * * As the oath of the appraiser requires him to well and faithfully examine the goods, and as the statute requires that at least one package in ten of the goods named in the invoice, whose value is in dispute, should be designated for examination, it is plain that an examination is requisite. * * * The strictness of the examination is not defined, except in the oath of the appraiser, that the appraiser shall well and faithfully examine. So that I do not think it incumbent upon me to prescribe any rules of examination which as matter of law must be complied with, except to say that it must be an *examination of such fidelity as to enable a merchant appraiser to obtain a knowledge of the values of the goods.* * * The only question then, is, did Mr. Friedman make an examination of the original packages or of the samples, of *such fidelity as to enable him to obtain a knowledge of the value of the goods?*"

A second case between Messrs. *Passavant & Co.* and the Government, respecting another invoice of velvets, came on for trial in May, 1882, before the same Court.

In this case, Judge SHIPMAN submitted two questions of fact to the jury, the first being whether Mr. Buckley, the merchant appraiser appointed by the Collector, sufficiently answered the requirements of the law in being "a discreet and experienced merchant," "familiar with the character and value of the goods" to be appraised, and the second being whether the examination of the velvets by the merchant appraiser was sufficient to satisfy the law.

In his charge to the jury, Judge SHIPMAN says:

* * * * * * * * *

"Secondly, the plaintiff claims that Mr. Buckley did not examine the goods as required by law. The statute provides that at least one in ten of the packages shall be designated and ordered by the collector to the public stores to be opened, examined and appraised, and that it shall be the duty of appraisers to ascertain and estimate the value by all reasonable ways and means in their power. This requires an examination of the goods in the packages, that is, in the selected packages, one of ten—in this case at least seven—or of such samples from one in ten of the packages as shall be equivalent to an examination of the whole packages; and the question is whether the examination of Mr. Buckley was such as the statute requires. It must be an examination of such fidelity as to enable the appraiser to ascertain the value of the goods. If he can ascertain the value without a thorough and searching examination, that is sufficient. *Generally speaking, and in the absence of special circumstances, the examination should be of that character which wholesale dealers ordinarily make in the purchase of goods at wholesale to ascertain the value when they are relying on their own judgment.*"

III.

The merchant appraiser was a competent witness to prove his own disqualification for the office to which he was appointed, as well as the non-performance of acts upon which the jurisdiction of the Board of Reappraisement depended.

There was no effort to show by the merchant appraiser any wilful impropriety of conduct on his part in the course of proceedings regular in themselves; nor was there any effort to show the reasons which prevailed with him in reaching his estimates of value.

The questions put to the merchant appraiser were directed, first, to show facts disqualifying him to hold the office, and, secondly, to show that he failed in the performance of certain duties prescribed by statute as prerequisites to a valid appraisement.

Both inquiries led directly to questions of jurisdiction; the first going to the legal organization of the reappraising Board, and the second, to the power of the merchant appraiser to make a valid and legal report.

The counsel for the defendant seeks to apply the rule to a merchant appraiser which he says prevails in the case of a juror, and which he states to be that a juror 'cannot be heard to attack his finding." It is upon this ground that he seeks to exclude the testimony of Mr. Bates.

(*a*) Even though the positions of a juror and a merchant appraiser were sufficiently analogous to justify, from like considerations of policy, the application of a like rule, it would by no means follow that Mr. Bates was not a competent witness upon the subject as to which he was examined.

The rule invoked by counsel is subject to qualifications, and by no means goes to the extent of excluding a juror's testimony as to matters occurring *outside the consultation room or without the immediate business of deliberation and conclusion upon a verdict.*

Wight vs. Telegraph Co., 20 Iowa, 210.
Packard vs. U. S., 48 Amer. Dec., 376*n*.
Hefron vs. Gallupe, 55 Me., 563.
Ritchie vs. Holbrook, 7 S. & R., 458.

Follansbee vs. Walker, 74 Penn. St., 309.
Woodward vs. Leavitt, 107 Mass., 453.
U. S. vs. Reid, 12 How. U. S., 366.
York, &c. vs. Meyers, 18 How. U. S., 246.

Thus in the case of *Wight vs. Telegraph Co., supra*, the Court said, per COLE, J.:

"While we do not feel entirely confident of its correctness, nor state it without considerable hesitation, yet we are not without that assurance, which, under the circumstances, justifies us in laying down the following as the true rule:

"That affidavits of jurors may be received for the purpose of avoiding a verdict, to show any matter occurring during the trial or in the jury room, which does not essentially inhere in the verdict itself, or that a juror was improperly approached by a party, his agent or attorney; that witnesses or others conversed as to the facts or merits of the cause, out of court and in the presence of jurors; that the verdict was determined by aggregation and average or by lot, or game of chance or other artifice or improper manner; but that such affidavit to avoid the verdict may not be received to show any matter which does not essentially inhere in the verdict itself, as that the juror did not assent to the verdict; that he misunderstood the instruction of the Court, the statements of the witnesses or the pleadings in the case; that he was unduly influenced by the statements or otherwise of his fellow jurors, or mistaken in his calculations or judgments, or other matter resting alone in the juror's breast."

Thus, also, in the case of *Hefron vs. Gallupe, supra*, after the evidence was closed, but before argument, during a temporary adjournment of the Court, one of the jurors called upon the defendant, asked for, received and read in part a printed copy of the evidence adduced at a former trial of the cause, and formed a conclusion therefrom that the testimony of some of the witnesses at a former trial varied somewhat from the evidence given by them at the latter.

The verdict was for the plaintiff for nominal damages.

A motion was made for a new trial, and in support of the motion the plaintiff filed the affidavit of Briggs and six other jurors.

The verdict was set aside and a new trial granted.

Objection was taken to the admissibility of the juror's evidence.

KENT, J., says:

"* * * The defendant interposes the objection that all this testimony is inadmissible. We concur with him so far as the testimony of the jurymen, as to what transpired in their deliberations when acting as a jury, and exclude it from our consideration. But we know of no rule of law that excludes the testimony of a juror as to facts touching his own conduct or proceedings, when separated from his fellows, or the acts or declarations of a party to or with him, touching the question pending. The rule which excludes the testimony of jurors, as to any irregularity or misconduct of the jury, applies to such acts when the jury is acting or deliberating as an organized body, presided over by their foreman and performing their official duty."

(b) But the position and duties of a merchant appraiser differ too widely from those of a juror to justify the application of the same rule.

One of the merchant appraiser's undoubted duties is to consult with his associate upon the evidence of value before them; and to determine upon the value of the goods which he was appointed to appraise. In so far it may be that his duties resemble those of a juror, and that by the application of the rule referred to, he could not be heard either in a collateral or direct proceeding to disclose the evidence upon which he relied, or the reasons which actuated him in arriving at his conclusions. In such case, as in the case of a juror, the rule referred to and the reason for the rule are equally applicable.

But he has other duties which are in nowise analogous to those of a juror. He is at once judge, juror and counsel.

He must "by all reasonable ways and means in his power ascertain, estimate and appraise the true and actual

market value and wholesale price." He may call before him and examine upon oath "any owner, importer, consignor, or other person touching any matter or thing which he may deem material in ascertaining the true market value or wholesale price of any merchandise imported."

He is sole judge of the materiality, competency, and even necessity for evidence. And he has an *unquestionable* discretion as to its weight and effect.

He may hold open sessions at which examination, appraisal, deliberation and decision may publicly take place, or he may exclude from the appraisement proceedings all persons whomsoever. He may agree upon a report with his associate, or he may make a separate report to the collector.

But there is still another—a *distinctive*—duty imposed on the merchant appraiser, which differs wholly from any duty imposed upon jurors.

He must *examine* "at least one package of every invoice, and one package at least in every ten packages of merchandise," to be designated by the collector.

This duty is one *apart from any jury duty* which the appraiser has to perform.

He may make this examination at any time after his appointment; and either in the presence of his associate or the importer, or either or neither of them.

This act is *jurisdictional.* The appraiser must perform it or he will have no jurisdiction to act as appraiser, and his report, with all proceedings based upon it, will be void.

In making this examination the appraiser does not perform a juror's function, *but qualifies himself in a mode prescribed by statute to act as appraiser.* A failure to so qualify himself will make void his report.

It can hardly be that the law will permit a statutory and jurisdictional requirement to be nullified by excluding from the witness stand the merchant appraiser, who may be the only person able to testify whether the *express* requirement of statute has been complied with or not.

(*c*) The appraiser's position is more nearly analogous to that of an arbitrator, and the cases affecting the latter furnish the rule for the former.

An arbitrator, no more than a juror perhaps, may be heard to impeach his award by showing the grounds of his conclusion, or his understanding of the legal effect or consequences of his award, nor may an arbitrator be called to vary the terms of his written award.

But it is well settled that an arbitrator may be examined upon matters *upon which his jurisdiction to make an award* depends.

Says ABBOTT, in his Trial Evidence, p. 468: "An arbitrator may be required to testify to *facts* upon which his legal power depended, but not the propriety or impropriety of his exercise of it."

This rule is well settled in New York.

Birbeck vs. Burrows, 2 Hall, 53.
The Mayor, &c., vs. Butler, 1 Barb., 335.
Briggs vs. Smith, 20 Barb., 409.
Cole vs. Blunt, 2 Bosw., 117.

In the case of *Birbeck vs. Burrows, supra*, the submission was by parol; and as the award did not in terms cover all matters in controversy between the parties, the evidence of the arbitrator to show what the matters submitted were, was rightfully admitted.

PER CURIAM * * * "If parol evidence was *admissible*, the arbitrator himself was not only a competent but the best witness to be produced."

In the case of *Cole vs. Blunt*, *supra*, it was agreed by the parties that the counsel should close their arguments on the 14th June. The arbitrators heard counsel on one side on the 14th June and then adjourned to the 19th June, and, against the objection of the defendant, heard the counsel for the other side (plaintiff) then.

Action upon the award. Answer, that the arbitrators *exceeded their powers* by hearing argument on the 19th June.

DUER, Ch. J.:

* * * "It may be true that before the Code—and we will not say that such is not still the law—an arbitrator was an incompetent witness to prove misconduct of himself or his associates; he was not permitted to impeach an award by proving facts that occurred in the intercourse of the arbitrators with each other, or in their secret deliberations; but we are not aware and cannot believe that it has ever been held or supposed that an arbitrator might not be admitted to testify to facts that occurred upon a public hearing and in the presence of the parties, and to the decisions that were then openly made by himself and his associates; and it appears to us that to exclude his testimony in relation to such facts would be quite as unreasonable as to hold that a Judge may not sign a bill of exceptions containing the proceedings and his own decisions upon a trial."

The same rule prevails in Massachusetts, Pennsylvania, Delaware, Maine and Illinois.

Strong vs. Strong, 9 Cush., 560.
Hale vs. Huse, 10 Gray, 99.
Roop vs. Brubacker, 1 Rawle (Pa.), 304.
Stevens vs. Gray, 2 Harr. (Del.), 347.
Woodbury vs. Northy, 3 Maine, 85.
Spurck vs. Crook, 19 Ill., 415.

And in England,

Redman on Awards, p. 114.
Brophy vs. Holmes 2 Molloy, 1.
Russell on Awards, p. 504.
In re Dare Valley R. R. Co., L. R., 6 Eq., 429.

Duke of Buccleugh vs. Board of Works, L. R., 3 Ex., 306; L. R., 5 Ex., 234; L. R., 5 E. & I. App., 418.

The last named case was an action brought upon an award. The plaintiff had a certain interest in a mansion in Parlament street, the back of which is parallel to and bounded by the river Thames; and the defendants had constructed an embankment between the back of the plaintiff's premises and the river. For the purpose of constructing it the defendants found it necessary to remove the area or mass of water which formerly used to run at the back of the premises between high and low water mark, and also to annihilate or take away a causeway or jetty running from the foot of some stairs, on the plaintiff's land, across the shore to low water mark. The plaintiff in consequence made a claim, which we find from the notice which he gave to the defendant from the award, and from the evidence given on the trial before the arbitrator, was two-fold: First, for the annihilation of the jetty and landing place; and secondly, for the taking away of the water which used to flow along the eastern or river side of the premises. The arbitrator awarded £8,325, and on being called as a witness to state in detail how that sum was made up, the plaintiff objected, but the evidence was admitted.

A rule was obtained calling on the plaintiff (in whose favor a verdict was entered for the full amount of the award) to show cause why a verdict for defendant should not be entered or a new trial had on the ground that the arbitrator (umpire under the Lands Clauses Act, 1845) had awarded compensation in respect of the items of injurious affection, the existence of which was not shown at the trial.

There was no cross rule on the ground of improper reception of evidence, but the umpire's evidence was admitted subject to the opinion of the Court. If ad-

missible and relevant it was to be considered; if inadmissible it was to be struck out.

KELLEY, C. B.:

* * * "No doubt, if the umpire is shown, by properly *admissible* evidence, to have included in his award subjects of compensation, which he ought not to have included, inasmuch as the plaintiff was not entitled to recover in respect of them, and thus to have exceeded his jurisdiction, the award is bad. * * * I think it is open to a defendant to show that the sum awarded by an arbitrator includes an amount for something over which he had no jurisdiction. Suppose, for example, that an arbitrator were empowered to give compensation for injury to a house numbered 'one' in a particular row of houses, and he professed to award such compensation, although in fact the whole evidence before him related to injury to a house numbered 'two,' and his award really was made for injury to that house. Can it be doubted but that this circumstance might be proved by the defendant on the trial of an action on the award, and if so, *I see no reason why it should not be proved by the evidence of the umpire himself.*"

MARTIN, B.:

* * * "I am of opinion that he (the umpire) was a competent witness, and I see no difference between the case of an arbitrator selected by the parties voluntarily, and one to whom they are compelled by act of Parliament to refer, and when any arbitrator is appointed to determine matters A. and B., and without authority determines C., that would, in my judgment, make the award void. *But then, can this be shown by the evidence of the arbitrator or the umpire himself? I think it can.* It is true that a juryman would not be permitted to disclose what passed in the jury-box, while a verdict was being considered, *but the principles of public policy which exclude him do not apply to an arbitrator.*

"Rule discharged."

The case was appealed to Exchequer Chamber and the same questions were considered.

BLACKBURN, B.:

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BLACKBURN, B.:

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course, any attempt to annoy an arbitrator, by asking questions tending to show that he had mistaken the law or found a verdict against the weight of evidence, should be at once checked, for these matters are irrelevant. But where the question is, whether he did or did not entertain a question over which he had no jurisdiction, the matter is relevant, and nobody can be better qualified to give testimony on that matter than the umpire. I wish to guard against being supposed to express an opinion that a juryman might be asked on what grounds he and his fellows gave their verdict. That involves very different considerations, and may be decided when the case arises. But I can see no reason for the doubt as to whether the umpire's evidence was admissible. And in the recent case of the *Dare Valley Ry. Co.*, Law Rep., 6 Ex., 429, upon a question closely resembling the present, the Lord Justice GIFFORD, then Vice-Chancellor, expressed a clear opinion as to the admissibility of the evidence of an arbitrator, and acted upon it."

MELLOR, J.:

* * * "It must, at least, occasionally happen that, without the evidence of the arbitrator, there would be no means of arriving at the fact."

All the Judges agreed upon this question.
Judgment affirmed.

The case then came before the House of Lords, and the same question was considered there.

Mr. Baron CLEASBY said: * * * * *

"First. With regard to the competency of the umpire as a witness, I am not aware of any real objection to it. * * * *

"Secondly. Being competent generally, it follows that he may be questioned as to what took place before him, so as to show over what subject matter he was exercising jurisdiction."

Mr. Baron MARTIN:

"MY LORDS—In answer to your lordship's first question, I am of opinion that the evidence given by the umpire was admissible, and I see no limit as to its purpose and extent beyond the ordinary one, that evidence is to be confined to the matter in issue. The object of calling him was to prove the seventh plea, viz.: that the sum awarded by him included damages and compensation for matters in respect of which he had no power or right to award or

assess compensation. Now, *if this matter is to be the subject of judicial inquiry, there is no person who possesses the same means of proving the truth as the umpire. He must know in respect of what he awarded, and to exclude him would seem like excluding the truth.*"

* * * * * * * * * *

"As regards the reception of the evidence, in my opinion the line has been most properly and accurately drawn by Mr. Baron CLEASBY. It appears to me that upon every point which may be considered to be a matter of fact with reference to the making of the award, the evidence of the arbitrator or umpire was properly admissible. He was properly asked what had been the course which the argument before him had taken—what claims were made and what claims were admitted—so that we might be put in possession of the history of the litigation before the umpire up to the time when he proceeded to make his award. But there it appears to me the right of asking questions of the umpire ceased."

All the Judges agreed, and the judgment was affirmed.

IV.

That portion of § 2900 which provides, in certain cases, for the imposition of an additional duty of 20% is in conflict with the Constitution of the United States, and is therefore void.

"The Congress shall have power to lay and collect taxes, duties, imposts and excises, to provide for the common defense and general welfare of the United States; *but all duties, imposts and excises shall be uniform throughout the United States.*

To regulate commerce with foreign nations, &c., &c."

§ 8 of Art. I. of the U. S. Const.

No person * * * shall be deprived of life, liberty, or property, *without due process of law.*

5th Amendment to U. S. Const.

Nor shall any State deprive any person of life, liberty, or property, without due process of law,

14th Amendment to U. S. Const.

Comprehensive definitions of the phrase "due process of law" have been attempted by counsel, courts and text-writers, but necessarily without success.

Says Mr. Justice MILLER in *Davidson vs. New Orleans* 96 U. S., 97:

> "It must be confessed, however, that the constitutional meaning or value of the phrase 'due process of law' remains to-day without that satisfactory precision of definition which judicial decisions have given to nearly all the other guaranties of personal rights found in the constitutions of the several States and of the United States."

The same learned Justice comments upon the infrequency with which the provision, found in the U. S. Constitution as a restraint upon the authority of the Federal Government, has been the subject of judicial inquiry, as compared with the provision containing a like restraint upon the authority of the States.

The following are some of the cases in which the meaning of the phrase has been approximated "by the gradual process of judicial inclusion and exclusion."

McMillen vs. Anderson, 95 U. S., 37.
Davidson vs. New Orleans, 96 U. S., 97.
Kirkland vs. Hotchkiss, 100 U. S., 491.
Springer vs. United States, 102 U. S., 586.
Kelley vs. Pittsburgh, 104 U. S., 78.
Hilton vs. Merritt, 110 U. S., 97.
Hagar vs. Reclamation District, 111 U. S., 701.
Wurts vs. Hoagland, 114 U. S., 606.

None of the cases cited above control nor reach, in our judgment, the case which is presented here for adjudication.

The plaintiffs are not at this time complaining of the tribunals established by Congress for the appraisement of values and assessment of regular duties thereon, as prescribed by law.

It may be conceded that Congress, with full power to regulate commerce, may prescribe that the values of merchandise upon which *ad valorem* duties are levied, shall be ascertained in the first instance by the appraising officers of the Government, and afterwards, in the event of dissatisfaction, by a reappraising board and the collector.

It may be conceded that this process of determining the amount of duties is "due process," in that it is analogous to methods which have in all times been recognized, necessary and usual processes for collecting the revenue with which Government has been supported.

The question here presented admits of many clear distinctions from those which have been discussed and adjudicated.

It is this, may an importer be subjected to a harsh, unequal and oppressive duty, beyond that regularly prescribed by law, for a failure on his part to correctly anticipate, determine, and state, in his invoice and entry the true and actual foreign market value of imported merchandise, *as the same shall thereafter be found by a tribunal before whom he may only appear as a witness?*

By U. S. Rev. Stats., § 2854, the importer is required to state in his invoice, if the goods have been purchased, the actual cost thereof, charges, &c.

And when obtained in any other way than by purchase, he must state *the actual market value thereof,* at the time and place, when and where the same was manufactured or procured, &c.

§ 2900 provides as follows:

"The owner, consignee, or agent of any merchandise which has "been actually purchased, or procured otherwise than by purchase, "at the time, and not afterward, when he shall produce his orig- "inal invoice to the collector and make and verify his written "entry of his merchandise, *may* make such addition in the entry to

"the cost or value given in the invoice *as in his opinion may* "*raise the same to the actual market value* or wholesale price of such "merchandise at the period of exportation to the United States in "the principal markets of the country from which the same has "been imported; and the collector within whose district the same "may be imported or entered may cause such actual market value "or wholesale price to be appraised; *and if such appraised value* "*shall exceed by ten percentum or more the value so declared in the* "*entry*, then, *in addition to the duties imposed by law* on the same, "*there shall be collected a duty of twenty per centum ad valorem on* "*such appraised value*. The duty shall not, however, be assessed "upon an amount less than the invoice or entered value."

What *failure of duty* must the importer have been guilty of in order to subject him to this penalty? None that is apparent and none that exists.

Must he have *fraudulently* concealed information or have *fraudulently* undervalued his merchandise?

Not at all. The revenue laws provide for a *forfeiture* of imported merchandise, after seizure and trial, where there has been *fraudulent* undervaluation.

The importer's declaration upon his invoice and in his entry may be the result of an honest opinion. His *opinion* is all that the statute requires that he should state.

And yet, if in his honest *opinion* he forms an estimate of the actual market value of the merchandise, which is less by 10% than the estimate afterwards arrived at by an appraising Board, whose hearings he has no *right* to attend, whose witnesses he may not cross-examine, whose evidence he may not criticise, and whose report he cannot review in Court, he will be subjected to this harsh and unequal duty or penalty.

There may be no fraud on the part of the importer and there may be no violation of law.

The law requires him *to state his opinion.*

The customs officers are not put to the proof that the importer has *not* truly stated his opinion. They concede that he may have stated his opinion; but impose

the additional duty or penalty *because his opinion as expressed differs from the opinion afterwards expressed by the appraising Board.*

This unusual and oppressive imposition cannot be justified on the ground that it is uniform.

It is not every general law, that is free from the constitutional objection, that it does not provide for due process of law in the warrant, which it establishes, for the taking of property.

Says Judge COOLEY in his "Constitutional Limitations":

"On the other hand, he shall find that general rules may sometimes be as obnoxious as special, if they operate to deprive individual citizens of vested rights. While every man has a right to require that his own controversies shall be judged by the same rules which are applied in the controversies of his neighbors, the whole community is also entitled, at all times, to demand the protection of the ancient principles which shield private rights against arbitrary interference, even though such interference may be under a rule impartial in its operation. It is not the partial nature of the rule, so much as its arbitrary and unusual character, that condemns it as unknown to the law of the land. * * *

And we have met in no judicial decision a statement that embodies more tersely and accurately the correct view of the principle we are considering, than the following from an opinion by Mr. Justice JOHNSON of the Supreme Court of the United States:

'As to the words from Magna Charta incorporated in the Constitution of Maryland, after volumes spoken and written with a view to their exposition, the good sense of mankind has at length settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

Cooley on Const. Limit., p. 434, 5th Ed.
Bank of Columbia vs. Okely, 4 Wheat., 235, 244.

The imposition of the 20% upon the conditions prescribed by the statute is equally obnoxious whether it be considered a penalty or a duty.

No decided case has effectually determined its character.

While § 8 of the Act of 1846 was in force, the Supreme Court held that the law relating to exportation for the benefit of draw-back, does not contemplate a return of these additional duties, or of any part of the amercements or forfeitures resulting from illegal dealings of importers or their agents, thus basing their decision on the theory that the provision was primitive in character.

Bartlett vs. Kane, 16 How., 263.

In the case of *Fallick vs. Barney*, 5 Blatch., 39, it was held that the exaction of these duties must be protested against, the same as in the case of other duties.

In the same case, it was held that the Collector had not exhausted his power, when he had seized the goods for undervaluation and had failed in Court to forfeit the property, but must still exact the 20% duty arising out of the undervaluation *found by the appraiser*.

But in the Supreme Court it was held that if these duties have been levied, there can be no forfeiture as claimed under another law imposing that as the penalty for undervaluation with design to evade the duties.

U. S. vs. 67 Packages, &c., 17 How., 85.

In the case of *Bartlett vs. Kane, supra*, Mr. Justice CAMPBELL said:

"The provision for the return of the duty upon a re-exportation * * * does not include in its purview any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the Government comprehend them within its regular estimates of supply. They are the compensation for a *violated law*, and are designed to operate as checks and restaints upon fraud and injustice."

If the exaction of this duty of twenty per cent. is a

penalty for a "violated law," we submit that the law is in each case an *ex post facto* law. The law which is violated has no existence until after the reappraisement has taken place, for it is not until then that the value of the merchandise is ascertained and adjudged; but the act of the importer which is construed to be an offense has been done, and must, by the law, be done before such adjudication has taken place.

Then, too, if it is a penalty, it must be upon a finding in some form or other that the importer has violated some positive mandate. What is the mandate and how is the conviction of the offense accomplished? The mandate is to raise the invoice value of the merchandise entered to such a sum *as, in his opinion*, may reach the actual market value. No inquiry is ever made whether the importer truly stated his opinion in the entry. If he does truly state his opinion, then there is no violation of any mandate.

The subsequent finding by the Board of Reappraisement that *the importer's opinion was wrong* is the only conviction of the offense provided for, and that is reached by a tribunal before whom no question of the importer's good faith can come.

No severer arraignment of the law can be conceived than the simple statement of its operation and effect by a recent text-writer, who seems oblivious throughout of any constitutional objection to it.

Mr. Webster Elmes in his work on "The Law of Customs" § 589 comments upon the law, mainly in the way of instructing the profession as to the purport and effect of the system, as follows:

"The collector of customs is inhibited by law from the assessment of duties upon an amount less than the invoice or entered value (R. S., §2900). The true force of this provision is that the

importer is to be holden to his own statement of the value of his importation, with all the consequences attending it.

Haas vs. Arthur, 14 Blatchf., 346.

If he raises the value, fearing the contingency of an advance by the appraisers, he must abide by it in the increase of duty it occasions. If he takes the other alternative and relies upon his invoice as expressing the true value, he must take the risk of an advance by the appraisers, and consequently of the onerous penal or additional duty, against which neither the Collector of Customs nor the Courts can relieve him. He cannot qualify the effect of this choice between two evils by assigning the reason which impelled him to advance his invoice value; even against his better judgment as to the true value of his importation.

He must remain liable upon the basis of the value which he has himself fixed to escape a greater evil, for the appraisers cannot reduce it even if they are convinced that the value is excessive.

In a suit, the claim that he was in duress to escape the risk of more onerous consequences will not avail him (Haas vs. Arthur, 14 Blatchf., 346; Harman vs. Maxwell, 3 Blatchf., 420). A decision of the Supreme Court in the year 1850 would seem to be in conflict with this doctrine, but in view of the different state of the law at the time the case arose, the two cases in which the conflict is apparent are clearly distinguishable (Maxwell vs. Griswold, 10 How., 242."

The imposition of the duty of 20%, whether as a penalty or additional duty, under the conditions prescribed by the statute, is the taking of property wholly unsupported by any known principle of taxation, and wholly unwarranted by any assumed violation of law, written or unwritten.

V.

No duties were legally assessable on charges or commissions, and the Court erred in refusing to direct a verdict for the plaintiffs for the sum of $361.75, being the regular duty of 60% and additional duty of 20% on the charges and commissions.

The Act of March 3, 1865, § 7, provided that the actual market value of merchandise should be the value upon which duties should be computed.

This act was in force from April 1, 1865, until July 28, 1866, when it was repealed by § 9 of the Act of 1866, providing that in order to determine dutiable value of merchandise, costs and charges should be added to the cost or wholesale price.

The former of these acts was re-enacted in § 2906 and the latter in § 2907 of the U. S. Revised Statutes, so that the two contradictory policies of estimating dutiable value of merchandise have now a place in the statute.

They now read as follows:

§ 2906. "When an ad valorem rate of duty is imposed on any "imported merchandise, or when the duty imposed shall be regu- "lated by, or directed to be estimated or based upon, the value of "the square yard, or of any specified quantity or parcel of such "merchandise, the collector within whose district the same shall be "imported or entered *shall cause the actual market value or whole-* "*sale price thereof*, at the period of the exportation to the United "States, in the principal markets of the country from which the "same has been imported, to be appraised, *and such appraised value* "shall be considered the value upon which duty shall be assessed."

§ 2907. "In determining the dutiable value of merchandise, there "shall be added to the cost, or to the actual wholesale price or "general market value at the time of exportation in the principal "markets of the country from whence the same has been imported "into the United States, the cost of transportation, shipment, and "transshipment, with all the expenses included, from the place of "growth, production, or manufacture, whether by land or water, "to the vessel in which shipment is made to the United States; the "value of the sack, box, or covering of any kind in which such mer- "chandise is contained; commission at the usual rates, but in no "case less than two and a half per centum; and brokerage, export "duty, and all other actual or usual charges for putting up, pre- "paring, and packing for transportation or shipment. All charges "of a general character incurred in the purchase of a general in- "voice shall be distributed *pro rata* among all parts of such in- "voice; and every part thereof charged with duties based on "value shall be advanced according to its proportion, and all wines "or other articles paying specific duty by grades shall be graded "and pay duty according to the actual value so determined."

These sections cannot both contain the true rule as to dutiable value. They are contradictory. The language of the latter section was originally deemed effective to repeal the former.

Thus a case arises where a rule of construction must be invoked in order to determine which section is to prevail.

The rule is well established that in cases of conflict that provision must prevail which is most favorable to the citizen.

Cobb vs. Hamlin, 3 Cliff., 191.
Powers vs. Barney, 5 Blatch., 202.
U. S. vs. Wigglesworth, 2 Story, 374.
Adams vs. Bancroft, 3 Sumner, 387.

VI.

There is no authority in the Customs Revenue laws for the imposition, in any case, of the additional duty of 20% upon charges and commissions.

U. S. Rev. Stats., §§ 2900–2902.
Treasury Decisions for 1877, No. 3192.
Sampson vs. Peaslee, 20 How., 571.
Cobb vs. Hamlin, 3 Cliff., 191.
Vaccari vs. Maxwell, 3 Blatch., 374.
Passavant vs. Merritt, *supra*.

The case of *Sampson vs. Peaslee*, *supra*, arose under the 8th section of the act of July 30, 1846, which declared that "if the *appraised value* of imports, which have actually been purchased, shall exceed by 10 per centum or more the *value declared on the entry*, then, in addition to the duties imposed by law on the same, there shall be levied, collected and paid a duty of 20 per centum *ad valorem on such appraised value*.

The Court held (p. 376) that the twenty per centum was to be on the appraised value *only, without being assessed on the charges and commissions.*

The language "actual market value and wholesale price," as occurring in § 16 of the act of August 30th, 1842, (now § 2902 of the Revised Statutes) was construed in the case of *Vaccari vs. Maxwell, supar*, and the construction thus put upon it excludes the idea of charges and commissions.

VII.

The judgment of the Circuit Court should be reversed and a new trial ordered.

D. H. CHAMBERLAIN,
W. B. HORNBLOWER,
EUGENE H. LEWIS,
Of Counsel.

123-356

In the Supreme Court of the United States.

OCTOBER TERM, 1886.

EMIL OELBERMANN, LOUIS F. DOMMERICH, and HUGO PEEPERS, plaintiffs in error,
vs.
EDWIN A. MERRITT, LATE COLLECTOR OF the port of New York.

No. 322.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

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No. 322.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF ARGUMENT.

The plaintiffs imported at the port of New York, as consignees, in 1879, velvet goods dutiable at 60 per cent. ad valorem. The merchandise was appraised. The appraised value exceeded the value of the entry 10 per cent. or more. Under section 2900, Revised Statutes, 20 per centum, in addition to the 60 per centum, additional duty was assessed. The importers were dissatisfied with the

appraisement, and a reappraisement was had under section 2930, by a general appraiser and an experienced merchant, who disagreed in the amount of the undervaluation of the entry, the general appraiser fixing the undervaluation at an average of about 17 per centum, and the merchant at about 9. The collector decided with the general appraiser and collected the duties accordingly. Section 2930 is as follows:

> If the importer, owner, agent, or consignee of any merchandise shall be dissatisfied with the appraisement, and shall have complied with the foregoing requisitions, he may forthwith give notice to the collector, in writing, of such dissatisfaction; on the receipt of which the collector shall select one discreet and experienced merchant to be associated with one of the general appraisers wherever practicable, or two discreet and experienced merchants, citizens of the United States, familiar with the character and value of the goods in question, to examine and appraise the same, agreeably to the foregoing provisions; and if they shall disagree, the collector shall decide between them; and the appraisement thus determined shall be final and be deemed to be the true value, and the duties shall be levied thereon accordingly.

The importers claimed the reappraisement was void for irregularity, and that the law for the collection of the 20 per centum additional, is unconstitutional. The plaintiffs, by the 1st and 11th exceptions to the rejection of the testimony, claimed the right to be informed of "the names of the reappraisers * * * in order that they might satisfy themselves as to the qualifications of the appraisers under the law." In pursuance of this claim a letter

was offered, and excluded as immaterial. dated the 28th of July, 1879, requesting the information from the collector. R. P. 23.

The statute does not require the collector to consult the importers as to the qualifications of the appraisers, but vests the right to select, out of a given class in him alone. The information requested by the importers if given would not have conferred upon them any power of selection or challenge, and if refused they were deprived of no legal right. The evidence offered in this issue, there being no fraud alleged, was immaterial.

The second, third, fourth, and fifth exceptions of the plaintiffs to the rejection of evidence was the claim of a right, after the collector had selected an appraiser of the class provided by statute, to allow the jury to pass upon the legal competency of the appraiser, not by proof he did not belong to the class, but by weighing evidence as to his fitness by the extent of his knowledge or experience within the class. The Court, passing upon these offers, expressly stated in ruling upon the particular questions contained in the exceptions:

> I will exclude that in that form, but I do not intend to cut you off from introducing any competen-evidence of the fact that Mr. Bates was not a merchant, that is an experienced man having some familiarity with these goods; that he was not of the class pointed out in the act of Congress as an experienced merchant.

The statute fixes the qualifications of the appraiser "to be an experienced merchant, a citizen of the United States, familiar with the character and value of the goods

in question." This is descriptive of a class from which a collector has the right to select at his discretion. That his selection shall in every instance be the very best of the class is not required. If by an error in judgment one of the most ignorant of the proper class of merchants, instead of the best informed, was constituted an appraiser, it would not be competent to submit to a jury to pass upon the legality of the appraisement on such ground. If the appraiser selected was a merchant whose line of business would be likely to familiarize him with the value of the goods in question, his absence of intelligence with reference to his business would be merely a matter of opinion on which different persons might disagree. The collector might honestly believe him to be highly intelligent. The jury might conclude he was deplorably ignorant. In this disagreement the law has given the right to decide, to the collector, and his determination, if within the class from which he had a right to select, is final.

It is clear the court and counsel understood the testimony offered to refer to the want of capacity of the appraiser within the class, and not to show him to be outside of it. Each of the questions excluded point to how much familiarity, or to the extent of the appraiser's capacity, not his legal competency. The testimony is subject to the further objection that the questions asked the witness for an inference, or opinion of or concerning himself, instead of for the facts upon which an opinion should be based. Where the general appraiser acts the statute only requires a discreet and experienced merchant to be associated with him. The testimony was therefore rightly excluded by the court.

The sixth, seventh, eighth, ninth, and tenth offers of evidence were for the purpose of attacking the appraisement and placing before the jury for reappraisement by them the valuation of the merchandise.

The statute declares the appraisement when determined "shall be final and deemed to be the true value, and duties shall be levied thereon accordingly." In interpreting this clause it was ruled in the case of *Hilton* v. *Merritt* (110 U. S. R., 97), "the valuation of merchandise made by the customs officers, under the statutes, for the purpose of laying duties thereon, is, in the absence of fraud on the part of the officers, conclusive on the importer." In the case of *Hertz* v. *Maxwell* (3 Blatchford, 137), it is "held that the price fixed by the appraisers was conclusive as to dutiable value of the goods, and that no evidence could be given against it." To the same effect is *Belcher* v. *Linn* (24 Howard, 508). The testimony offered to overthrow the value as fixed by the appraisement was therefore inadmissible.

In the protest it was objected that the commissions, charges, &c., prescribed by section 2907 should not have been included in determining the dutiable value. The section referred to expressly declares that they shall be included. But a repugnancy is claimed to exist between that section and section 2906. No such repugnancy exists, as section 2906 states thatthe goods at the actual market value or wholesale price at the time of exportation shall be appraised. Section 2907 was enacted at a later date, and is but a definition of what shall be considered as making up the market value or wholesale price at the period of the exportation.

In the protest the plaintiffs take the position that the collection of the 20 per cent. is the collection of a penalty, and the act authorizing it unconstitutional, because the collection was without "due process of law." That the act of Congress authorized it cannot be denied. In the case of *Maillard* v. *Lawrence* (3 Blatchford, 381), the percentage added under a similar statute was ruled not to be a penalty, but was "regarded as an increase, on the contingency specified." In the case of *Murray's Lessees* v. *Hoboken Land and Improvement Company* (18 Howard, 272), the language in the Constitution "due process of law" was ruled not to prevent the collection of taxes or dues to the Government by summary process. In the case of *Hilton* v. *Merritt* (110 U. S. R., 107) the principle was directly applied to the collection of the alleged penalty in this case, imposed and collected under the statute now the subject of consideration, and the constitutionality of the statute was sustained.

G. A. JENKS,
Solicitor-General.

123-356

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1887.

No. 47.

EMIL OELBERMANN et als.,

Plaintiffs in Error,

vs.

EDWARD A. MERRITT, Collector,

Defendant in Error.

REPLY BRIEF FOR PLAINTIFFS IN ERROR.

DANIEL H. CHAMBERLAIN,

Of Counsel.

BURGOYNE QUICK PRINTING CO., COR. WALKER AND CENTRE STS., N. Y.

Supreme Court of the United States.

OCTOBER TERM, 1887.

OELBERMANN ET ALS.	
vs.	No. 47.
MERRITT, Collector.	

Reply Brief for Plaintiffs in Error.

I.

The learned Solicitor-General in his brief, page 3, states the proposition that "the statute does not re- "quire the collector to consult the importers as to the "qualifications of the appraisers, but vests the right "to select out of a given class in him alone." And upon this proposition he claims that the refusal of the trial Court to admit the letter of July 28, 1879, as well as its refusal to admit the several offers of evidence by the plaintiffs to show the legal incompetency of the merchant appraiser, were not errors of law.

His argument, repeated in a variety of phrases, is in substance that the statute (Sec. 2930) simply describes a class from which a selection may be made at the discretion of the collector, and consequently that our ques-

tions intended to discover before the re-appraisal and on the trial whether Mr. Bates, the merchant appraiser, was duly qualified to act as such, were immaterial.

We agree with the learned Solicitor-General in the abstract proposition that the statute "vests the right to select out of a given class in the collector alone;" and further, that if the offers of evidence which were rejected by the trial Court were directed to ascertaining the degree of the qualification of the merchant appraiser *within the class*, the evidence was rightly excluded.

But what we say in answer is, in a word, that the statute, in describing, fixing and limiting the *class* from which the collector may select, describes the class as (1) "discreet and experienced merchants; (2) citizens of the United States; (3) familiar with the character and value of the goods in question."

No one of these three particulars is, in a legal sense, more or less important than the other. Each is essential.

For example, as is pointed out in our main brief, if the person selected were a discreet and experienced merchant, but a citizen of *England;* or if he were a discreet and experienced merchant and a citizen of the United States, but familiar only with the character and value of *hardware*, and not of velvets, it is beyond dispute, as it seems to us, he would not come within the class.

And if regard be had to the relative *practical* importance of these three requirements, it will at once be seen that the last is the one which must be held the most important; "familiarity with the goods in question" is plainly more important than the mere fact of citizenship or of being a merchant.

II.

Where does the learned Solicitor-General find the evidence of his assertion that our questions were directed to "allowing the jury to weigh evidence as to the merchant appraiser's fitness by the extent of his knowledge or experience within the class?"

The trial Court manifestly fell into the same error as the Solicitor-General, and, in excluding the question which appears in folio 25 of the Record, said:

"I will exclude that in that form, but I do not intend "to cut you off from introducing any competent evi- "dence of the fact that Mr. Bates was not a merchant "—that is, an experienced man, having some familiarity "with these goods; that he was not of the class "pointed out in the Act of Congress as an experienced "merchant."

There is some want of perspicuity in the above-quoted language of the trial Court. Thus, what is meant by "in that form"? What objection could there be to the "form" merely of the question? Did the Court mean that the question might be asked, *in substance*, of *that witness* in another "form"? If so, then it would seem the objection was not to the competency of the witness, but to the form of the question. However this may be, it is evident from this language that the Court, like the learned Solicitor-General, had not carefully examined the statute, for the Court seems to regard the provision that the merchant appraiser shall be "a merchant, that is, an experienced man, having some familiarity with these goods," as bringing him within "the class pointed out in the Act of Congress as an experienced merchant."

But, as we have already shown, the Act of Congress prescribes not merely that he shall be a merchant, but

that he shall be a citizen of the United States, and familiar with the character and value of the goods in question. Besides this, the language of the trial Court seems to imply that if a man is a merchant, it is equivalent to being "an experienced man, having some familiarity with these goods,"—which plainly is a mistake.

III.

But the Court, in the language quoted, declared that it did not intend to cut us off from introducing evidence that Mr. Bates was not "an experienced man having some familiarity with these goods"; but the questions which were excluded, and to the exclusion of which exceptions three, four and five were directed, were each questions intended to show precisely *that*; namely, that Mr. Bates was not "an experienced man having some familiarity with these goods."

The questions were (1): "Will you state whether, "at the time you were selected to act as merchant ap- "praiser, *you had any familiarity*, and if so, how much "familiarity, with silk velvets?"

"(2). Will you state what familiarity you had with "silk velvets at the time you were appointed merchant "appraiser in this case?"

"(3) At the time you were appointed merchant ap- "praiser were you familiar with the value of silk "velvets"?

Each of these questions, it is plain, was intended to show whether or not Mr. Bates was "familiar with the character and value of the goods in question," and each is framed distinctly in view of the requirement of the statute (Sec. 2930), that the merchant appraiser shall be "familiar with the character and value of the goods in question."

The trial Court, therefore, did do precisely what it said it did not "intend" to do, viz.: "cut us off from introducing evidence of the fact that Mr. Bates was not an experienced man, having some familiarity with these goods." The ruling of the Court, which has been quoted, conceded our exact position upon this point, but the Court in fact excluded all the testimony which was offered, or could be offered, to establish the incompetency of Mr. Bates upon the ground specified.

IV.

What authority, we beg to ask, has the learned Solicitor-General for saying, as he does at the bottom of p. 4 of his brief, "where the general appraiser acts, the statute only requires a discreet and experienced merchant to be associated with him"?

In point of fact, as page 2 of his brief shows, the statute requires that the merchant appraiser shall be a "discreet and experienced merchant, *and* a citizen of the United States, familiar with the character and value of the goods in question."

The learned Solicitor-General, by inference, and, indeed, *ex necessitate*, admits that the merchant appraiser must come within the *class* described in the statute. Hence, if he does not, it needs no argument to show that the reappraisement was void for irregularity, and we are entitled to a new trial.

V.

The 6th and 7th exceptions relate to *the sufficiency*, under the law, *of the examination* made by the merchant appraiser of the goods in question.

The learned Solicitor-General takes no notice of

these exceptions, except to say (p. 5 of his brief) that "the 6th, 7th, 8th, 9th and 10th offers of evidence "were for the purpose of attacking the appraisement "and placing before the jury for reappraisement by "them the valuation of the merchandise."

We have shown in our main brief, we think sufficiently, that this was a material issue, one of the materiality of which, the authorities cited leave no doubt, especially the case of *Greely vs. Burgess*, 2 Curtis, 216, and 18 How., 413.

Nothing could put this issue more distinctly than the question at folio 27, "Did you make any examination of any of the merchandise which was the subject of that reappraisement"?

The questions covered by the 8th and 9th exceptions have reference more particularly to the *extent* of the examination made, and in our view, were material, but perhaps not so clearly material as the question whether "any examination whatever" was made, though we rely upon each of these exceptions, as well as upon the 10th exception.

VI.

The 1st and 11th exceptions (folios 21 and 30), relate to the refusal to admit in evidence a letter addressed by the plaintiffs to the defendant, which appears on page 23 of the Record.

This letter was in substance a request to be informed of "the names of the appraisers selected to reappraise "the goods in question, in order that we (the plaintiffs) "may satisfy ourselves as to the qualifications of said "appraisers under the law."

Upon this question the learned Solicitor-General contents himself with saying, "the statute does not require the collector to consult the importers as to the

qualifications of the appraisers." Very good ; but if the statute does require that the person chosen shall possess certain specified qualifications, it is plainly the concern of those affected injuriously by his action to inform themselves of the facts ; and upon the trial of a cause it would seem to be quite plain that the fact that the plaintiffs had made an effort before the injury was done to put the Collector on his guard, and to remind him of the requirements of the statute, was decidedly *material*, as showing good faith, and as tending to warrant the production of the plaintiffs' other evidence to show the illegality of the re-appraisement.

VII.

The learned Solicitor-General seems to lay stress upon the fact that the statute in question (Sec. 2930), declares that " the appraisement thus determined shall be final, and be deemed to be the full value, and the duties shall be levied thereon accordingly."

This reference seems to be made, if made for any intelligible reason, for the purpose of showing that the present suit will not lie ; for, if the meaning of the statute is that the reappraisement is " final " in every sense of the word, then this suit had been mistakenly brought, and the learned District Attorney at New York should have made summary disposition of it long ago. It is sufficient to say here, in answer, that by Sec. 2931, Rev. St., provision is made in detail for the bringing of such a suit as the present one, under specified conditions, and that Sec. 3011 more especially provide that " any person who shall have made payment under " protest, &c., of any money as duties, when such " amount of duties was not, or was not wholly author- " ized by law, may maintain an action in the nature of " an action at law which shall be triable by jury to as-

" certain the validity of such demand in payment of " duties, and to recover back any excess so paid."

The citations made by the learned Solicitor-General, on page 5 of his brief, are, therefore, very wide of the mark.

VIII.

The learned Solicitor-General, alluding to our position that the collection of the 20 per cent. is the collection of a penalty, and the act authorizing it unconstitutional, cites the case of *Maillard vs. Lawrence*, 3 Blatchford, 381, to the effect that the 20 per cent. is not a penalty but "an increase on the contingency specified."

That case was an action against the collector at New York, to recover back an excess of duties and the penalty. The jury found a verdict for the plaintiff, subject to the opinion of the Court on a case. The Court held that the plaintiffs were entitled to recover the excess of duties claimed, "together with 50 per cent. thereon collected as additional duties, together with interest on both sums." But the Court added: "We do not ac- " cede to the proposition of the plaintiffs that the 50 " per cent. added to the regular duties may be recov- " ered by them *without protest*, on the ground that it is " a penalty. We regard it as an increase on the con- " tingency specified of the duties chargeable on the im- " ports, and accordingly are of opinion that the im- " porter must pursue the same course in respect to that " incident as to the principal, and cannot recover it as " a separate demand and cause of action, but only upon " protest, as required by the Act of 1845. The chief " duties, however, not having been rightfully assessed " in this case, the incident or consequent increase " charged upon the goods was unlawfully exacted, and " must be repaid."

The only apparent application of this case to the present one is as showing that we are entitled to recover the 20 per cent., whether as penalty or as additional duties, because we have protested as the law requires.

But it is no part of our argument that because the 20 per cent. is a "penalty," it is, *therefore*, unconstitutional or recoverable, but because its exaction, under whatever name, is depriving a person of property "without due process of law."

The other authorities cited by the learned Solicitor-General are "*Murray's Lessees vs. Hoboken Land Improvement Co.*, 18 How., 272; and *Hilton vs. Merritt*, 110 U. S., 107. The first of these is a very well-known case—an action of ejectment—both parties claiming title under one Swartwout, against whom, as Collector of Customs at New York, a balance had been found due by the United States Treasury, and a warrant had been issued by the Solicitor of the Treasury, and a sale made by the Marshal for the District of New Jersey, under which the defendants claimed title. The validity of this warrant being denied by the plaintiff upon the ground that it was not "due process of law," the Court held that it was an exercise of executive, and not of judicial, power, and was not an illegal process.

In the course of its decision the Court held that the warrant of distress was a proper summary means to compel "officers of the Government—and in case of their default, their sureties—to pay such balance of the public money as may be in their hands."

How far this decision is from any proper application to the present case need not be further pointed out.

Hilton vs. Merritt was a suit to recover an alleged excess of duties; and the grounds of recovery and the decision of the Court are thus stated by Mr. Justice WOODS.

"We are of opinion, therefore, that the valuation

" made by the customs' officers was not open to ques-
" tion in an action at law, as long as the officers acted
" without fraud, and within the power conferred on
" them by the statute. The evidence offered by the
" plaintiff and ruled out by the Court *tended only to*
" *show carelessness or irregularity* in the discharge of
" their duties by the customs officers, but not that they
" were assuming *powers not conferred by the statute*, and
" the questions which the plaintiffs proposed to submit
" to the jury were, in the view we take of the statute,
" immaterial and irrelevant."

Upon its facts and grounds of law, therefore, this case is not an authority here.

IX.

The learned Solicitor-General takes no notice of the really significant words of the trial Court as quoted by him, viz.: " any competent testimony " (fol. 25).

These words suggest the only serious question in the record, in our judgment,—was the offered testimony of Mr. Bates, the merchant appraiser, competent?

We have presented the cases which come nearest to being authorities here; but it must be admitted that they are valuable only as presenting close analogies. No case has probably arisen hitherto which presented this precise question.

But it is clear that the rule which excludes jurors and arbitrators from testifying in certain cases has certain well-defined logical limitations, arising from public policy.

It is also clear that the limitations applied to jurors and arbitrators would admit the testimony of Mr. Bates here.

But the character and functions of a merchant appraiser differ so widely from those of jurors that the

limitations upon their competency as witnesses must be widely different. This will appear sufficiently from the cases cited in our main brief.

X.

We have already alluded to what seems to be a position of the learned Solicitor-General, that under section 2930 the present reappraisement, and by parity all similar appraisements, are final and not reviewable by the Courts at the suit of aggrieved parties.

This position is so important and fundamental that we oppose to it this proposition, viz.:

THAT CONGRESS HAS NO POWER TO DEPRIVE THE CITIZEN OF THE RIGHT TO TEST BY TRIAL BY JURY THE LEGALITY OF ANY TAX OR GOVERNMENTAL EXACTION LAID UPON HIM.

The learned Solicitor-General here cites, and presumably relies on *Hilton vs. Merritt*, 110 U. S., 97; *Belcher vs. Linn*, 24 How., 508; cited also in *Hilton vs. Merritt*,—and *Hertz vs. Maxwell*, 3 Blatch., 137, in support of his position.

Hilton vs. Merritt, as well as *Belcher vs. Linn*, is misapprehended when it is thought to support the view of the learned Solicitor-General.

Stated as briefly as possible, the facts in *Hilton vs. Merritt* were these: The plaintiffs in error having entered certain goods for duty, and the local appraiser having appraised the same, the plaintiffs in error demanded a reappraisement; this being allowed, and a merchant appraiser being associated with the general appraiser, and the former having fixed the valuation at the same figures as the importer's invoice, and the latter having largely advanced the valuation, the collector, after the general appraiser had made an amended re-

port, fixed the valuation at the advanced sum, levying 50 per cent. *ad valorem* duty and 20 per cent. penalty or additional duty. The plaintiffs in error protested and paid duties as assessed, and after an ineffectual appeal to the Secretary of the Treasury, brought suit to recover $1,037.40, the alleged excess of duties exacted by the collector.

The Court below having refused the evidence offered by the plaintiffs in error, as well as their requests to charge the jury, the plaintiffs in error excepted.

This Court thus states the question: "The question presented by the exceptions of plaintiffs is *whether the valuation of merchandise* made by the customs officers under the statutes of the United States for the purpose of levying duties thereon is, in the absence of fraud on the part of the officers, conclusive on the importer, or is *such valuation reviewable in an action at law* brought by the importer to recover back duties paid under protest."

Examining the several provisions of the Revised Statutes, the Court finds that the language of Section 2930 —"and the appraisement thus determined shall be final and deemed to be the true value, and the duties shall be levied thereon accordingly"—"leaves no room for doubt or construction."

Referring to sections 2931 and 3011 of the Revised Statutes providing for an action, triable by jury, to ascertain the validity of the demand and payment of duties, and to recover back the excess, after due protest, this Court holds that "the appraisement of the customs officers shall be final, but *all other questions relating to the rate and amount of duties may, after the importer has taken the prescribed steps, be reviewed in an action at law to recover duties unlawfully exacted* (p. 106).

Referring to the evidence offered by the plaintiffs in error on the trial this Court says:

"The evidence offered by the plaintiff, and ruled out

by the Court, *tended only to show carelessness or irregularity in the discharge of their duties by the customs officers, but not that they were assuming powers not conferred by the statute,* and the questions which the plaintiffs proposed to submit to the jury were, in the view we take of the statute, immaterial and irrelevant" (pp. 106, 107).

This Court in *Hilton vs. Merritt* sought to give force to all the sections of the Revised Statutes which "establish our system" of customs collections; and accordingly found that the language of Section 2930 is given its proper force by holding that the appraisement or valuation fixed by the customs officers shall be final, but "all other questions relating to the rate and amount of duties" may be reviewed in an action at law, as prescribed by sections 2931 and 3011.

What those "other questions" were, is likewise stated or suggested thus (p. 106): "Questions frequently arise whether an enumerated article belongs to one section or another. * * * In determining the rate and amount of duties, the value of the merchandise is one factor, the question what schedule it properly falls under is another. * * * Questions relating to the classification of imports, and consequently to the rate and amount of duty, are open to review in an action at law. This construction gives effect to both provisions of the law."

The foregoing statement presents, it is believed, a perfectly accurate summary of the case and decision in *Hilton vs. Merritt*, and our inquiry now is as to its bearing on the present case.

In the first place, it seems clear that the question presented in this record are not, in some essential features, the same as in *Hilton vs. Merritt.* The several offers of evidence in that case are thus stated in detai by this Court (p. 100):

"Upon the trial of the case the plaintiffs offered in evidence the records of the proceedings before the mer-

chant appraiser and the general appraiser, including the testimony and various documents before those officers, and subsequently before the Collector. They also offered the testimony of one Hildreth, an expert, and others, to show the foreign market value of gloves at the principal markets of France, whence the merchandise in question were imported. They also offered the testimony of the Collector to show all the facts within his knowledge, or officially acted upon by him, in relation to the invoice in question, and to show what his experience was in valuing kid gloves. They also offered to prove the cost of the manufacture of goods similar to those in question. All this evidence so offered was excluded by the Court, and the plaintiffs excepted."

This offered evidence is thus summed up and characterized by this Court (p. 107):

"The evidence offered by the plaintiffs, and ruled out by the Court, tended only to show carelessness or irregularity in the discharge of their duties by the custom officers, but not that they were assuming powers not conferred by the statute."

Upon the trial of our case, the evidence offered may be stated in detail thus: After introducing evidence tending to show that the plaintiffs imported the goods in question and that being advanced in value by the appraiser the plaintiffs demanded a reappraisement, the result of which was the levying of duties at an advanced valuation, and their payment under protest, the plaintiffs "further to sustain the issues on their part," offered in evidence a letter of the plaintiffs to the Collector requesting the latter to inform them of the names of the appraisers selected in order that the plaintiffs might satisfy themselves as to their qualifications under the law. They also called Bates, the merchant appraiser, and asked him if when he was selected he "had any familiarity, and, if so, how much familiarity, with silk velvets"—the goods in question (fol. 24). They also sought to ask the same witness whether at the

time named he was "familiar with the value of silk velvets" (fol. 25). They also asked the same witness whether he made "any examination of the merchandise which was the subject of the reappraisement" (fol. 27). Other questions—variations or details of the foregoing—were asked, but the foregoing certainly raised the issues on which the plaintiffs relied and now rely.

Those issues it seem plain, relate to the legality of the appraisement, to its validity under the statute; not to its "regularity," not to "the rate or amount of duty," nor to "the classification of imports," nor to "the value of the merchandise," nor "what schedule it fell under;" nor, in fine, to any one of the questions raised by the exceptions or stated by the Court in *Hilton vs. Merritt.*

Unlike the evidence offered in *Hilton vs. Merritt*, our offered evidence tended to show, or was intended to show, that the merchant appraiser was not qualified or competent to act, and hence that the customs officers were "assuming powers not conferred by the statute."

Our case, therefore, is broadly and clearly distinguished from *Hilton vs. Merritt.*

Belcher vs. Linn, 24 How., 508, was a case very fully and ably argued, and carries every badge of authority, but it seems only necessary to say of it that it held that "in the absence of fraud the decision of the appraisers *as to the character of the article and the dutiable value of the importations* was final and conclusive." The question or questions involved in our case were neither presented by the record nor passed upon in the decision of *Belcher vs. Linn.*

In *Hertz vs. Maxwell*, 3 Blatch., 137, the sole ground of objection by the plaintiffs to the appraisement was "against the payment of 15 per cent. advance, and the penalty therefore accruing on velvets contained in the entries, *because we are fully satisfied that they were fully invoiced by the manufacturers.*"

The proposition we present—*that Congress has no power to deprive the citizen of the right to test by trial by jury the legality of any tax or governmental exaction laid upon him*—rests upon familiar constitutional provisions, and upon principles of law older and more fundamental, if possible, than our Constitution.

The constitutional provisions on which we rely are:

Art. III., section 1: "The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish." * * *

Section 2. "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States," * * *

Articles of Amendment, V.: "No person * * * shall be deprived of life, liberty or property, without due process of law."

Articles of Amendment, XIV., section I.: * * * "nor shall any State deprive any person of life, liberty or property without due process of law." * * *

Articles of Amendment, VII.: "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." * * *

By the first of the above provisions, the judicial power is lodged or distributed; by the second, it is defined.

The judicial power—extending to all cases, in law or equity, arising under the Constitution or laws of the United States—is lodged in this Court and the courts inferior to it which are established by Congress.

If, therefore, any case in law or in equity arises under the Constitution or laws of the United States, the power to decide it belongs to some court established by

the Constitution or by Congress; it cannot be decided finally by Congress or by executive officers acting under laws of Congress.

The fact that the judicial power is declared by the Constitution to extend to all cases in law and equity arising under the constitution and laws, makes it unnecessary to inquire here what is "judicial power"—a phrase, however, carefully defined in decisions of this and other courts.

The sole question to be considered at this point is, What is a "case, in law or in equity"?

Here a single authority is perhaps sufficient. 2 *Story*, Comm. (4th Ed.), § 1646, says:

"It is clear that the judicial department is authorized to exercise jurisdiction to the full extent of the Constitution, laws and treaties of the United States, whenever any question respecting them shall assume such a form that the judicial power is capable of acting upon it. When it has assumed such a form, it then becomes a case; and then, and not till then, the judicial power attaches to it. A case, then, in the sense of this clause of the Constitution, arises when some subject touching the Constitution, laws or treaties of the United States is submitted to the courts by a party who asserts his rights in the form prescribed by law. In other words, a case is a suit in law or in equity, instituted according to the regular course of judicial proceedings; and when it involves any question arising under the Constitution, laws or treaties of the United States, it is within the judicial power confided to the Union."

That the present question "arises under the laws of the United States" is apparent It certainly is a "case in law;" and unless our premises are mistaken, it is within the judicial power of this Court, and other United States Courts, inferior to this, to entertain and decide it.

But if it be said, as it may be, that it is not a "case

in law," because the scope and effect of section 2930 is to forbid the bringing of suits in such cases as the present, then we say, as we have already hinted, that upon principles older and more fundamental, if possible, than the Constitution, the subject-matter of the present question is one judicial in its nature and cannot be withdrawn from the cognizance and jurisdiction of the Courts established by the Constitution and by Congress acting under the Constitution.

By this we mean, more specifically, that the claim of right here set up by the plaintiffs is (1) of a judicial nature according to the approved standards of authority; (2) was recognized as judicial when the Constitution was adopted, and hence entered into its conception and grant of judicial power; and (3) is judicial under the approved standards which are of later date than the Constitution.

The claim made in the present suit by the plaintiffs is, that the proceeding by which a duty in addition to that imposed on the original invoices of goods as entered by the plaintiffs, has been imposed and collected, is illegal—not in accordance with the statute which is relied on to warrant it, viz., section 2930; and for that reason, the payment having been made under protest, the plaintiffs have the right to recover such excess over the duty on the importer's invoices.

(1) The legality or illegality of a tax, its validity or invalidity, the legal competency or incompetency of the officer or tribunal which under the statute fixes or imposes a tax, are *judicial* questions in their nature.

They are judicial, and not legislative nor executive, for the reason so briefly expressed by an eminent authority, thus: "The boundary between legislative and judicial power is in general clear. To declare what the law *is* is the province of the latter; to declare what

it *shall be*, within the limits of the Constitution, pertains to the former."

Judge Cooley, in note to § 376, Story Comm. on Const. (4th Ed.).

To decide the present question is to decide what the law *is*—whether, as applied to this case, it warrants or not the exaction of the present additional duties.

(2) Any matter which from its nature might have been the subject of a case, that is, a suit in law or equity prior to the Constitution, arising now under the Constitution or laws of the United States, is within the judicial cognizance of the Courts of the United States.

There is no answer to the inquiry, what are "cases in law and equity," except by a reference to the meaning of those terms as fixed at the time they were used, just as the meaning of the term "trial by jury," as used in the Constitution, must be drawn from the essential incidents and character of that institution as it existed when the Constitution was adopted.

Now, the claim of an unauthorized, illegal exaction of taxes or duties—an exaction made on the authority solely of a reappraisement by persons not competent under the statute to make such reappraisement—would, prior to the Constitution, unquestionably have been the subject of a suit at common law to recover the amount of such illegal exaction, if paid under protest.

What would have been then, or should be now, the form of the suit—the remedy—is not important or, at least, not essential. Mr. Justice STORY, in *Cary vs. Curtis*, 3 How., 236, 254, says, fortifying his statement by abundant authorities, especially *Elliott vs. Swartwout*, 10 Pet., 137, and *Bend vs. Hoyt*, 13 Pet., 263, 267:

"That an action for money had and received lies in all cases to recover back money which a person pays to another in order to obtain possession of his goods from the latter, who withholds them from him upon an illegal demand or claim, *colore officii*, and thus wrongfully re-

ceives and withholds the money. Such a payment is in no just sense treated in law as a voluntary payment, but it is treated as a payment made by compulsion and extorted by the necessities of the party who pays it. Such is the doctrine of the common law as held in England with a firm and steady hand against all the claims of prerogative, and it is maintained in our day as the undeniable right of every Englishman against the unjust and illegal exactions of officers of the Crown."

We concede that the choice of remedies is with the Legislature.

But it should be borne in mind that the apparent position of the learned Solicitor-General here is, that the reappraisement is "final and conclusive" under section 2930—in other words, that there is *no remedy whatever*, no method of review, no right of action or appeal, no power of revision anywhere.

The case just cited—*Cary vs. Curtis*—a revenue case from New York decided here in 1845, is worth attention on this point—a case which, we believe, has always been regarded as going to the full limit of upholding the power of Congress over the collection of customs duties and over the remedies for alleged excessive collections—a case in which Justices STORY and MCLEAN vigorously dissented on the ground of its latitudinarian doctrines in support of the legislative in distinction from the judicial power.

Yet, in *Cary vs. Curtis*, this Court went only to the point of holding that under the Act of 1839—which required collectors to pass to the credit of the Treasurer of the United States all moneys received for unascertained duties or for duties paid under protest,—"an action of *assumpsit* for money had and received would not lie against the Collector for the return of such duties so received by him."

That this Court had no idea of deciding in that case that any legislation could deprive the citizen of all

remedy in the courts against illegal exactions, the following (p. 250) will show:

"The legitimate inquiry before this Court is not whether all right of action has been taken away from the party, and the Court responds to no such inquiry. * * * The claimant was not without other modes of redress had he chosen to adopt them. He might have asserted his right to possession of the goods, or his exemption from the duties demanded, either by replevin, or in an action of detinue, or perhaps by an action of trover, upon his tendering the amount of duties admitted by him to be legally due. * * * And here is presented the answer to the assertion, that by the Act of 1839 or by the construction given to it by this Court, the party is debarred all access to the courts of justice, and left entirely at the mercy of an executive officer. Neither Congress nor this Court have furnished the slightest ground for the above assertion."

We have already pointed out that the claim here under section 2930 is and must be, if any, that in the present case there is no remedy, at least in the courts, the reappraisement being "final and conclusive."

The bearing of the constitutional provision forbidding any person being deprived of life, liberty, or property "without due process of law" has already been sufficiently considered in our main brief (pp. 21, 22).

It is plain, without argument, that if this suit is rightly brought, the plaintiffs are entitled to a jury trial, under Article VII. of the Amendments.

In concluding this point, we say that conceding all that has ever been decided by this Court in the direction of legislative control over our customs collection system, conceding especially the full effect of *Hilton vs. Merritt*, it seems incontrovertible that this suit is well

brought, because it raises the question, not of the amount fixed by the reappraisement, but of the legal validity of the reappraisement under section 2930—in other words, challenges and denies the existence of what Judge CAMPBELL in *Greely vs. Burgess* called "the conditions on which the validity of the assessment depends."

XI.

The question of the competency of the merchant appraiser as a witness on the trial to show his own lack of qualification under the statute, as well as the extent or fact of his examination of the goods in question is, in our judgment, as we have already intimated, the only serious question to be decided. It was, moreover, the only ground put forward by the Court below in awarding a new trial (22 Blatch., 41).

We have presented the cases most pertinent to this case which we have discovered, in our main brief. It seems proper to observe here that the Court below in its opinion awarding a new trial cites no authorities to support its main conclusion except *Tappan vs. United States*, 2 Mason, 393, 406, and *Harris vs. Robinson*, 4 How., 336.

Why the latter of these two cases was cited by the learned Judge below, we have never been able to guess, for according to our examination of the case, neither its syllabus, its statement of facts, the opinion of the Court, the dissenting opinion, nor even the briefs of counsel, contains a word which connects it to any degree, with the present case.

On p. 335 of the preceding case, *Rankin vs. Hoyt*, 4 How., — we do find that the other case, *Tappan vs. United States*, 2 Mason., 406, is cited, and we conclude that, by some inadvertence, the case was miscited.

But what is not less inexplicable, the remaining authority of the learned Judge,—*Tappan vs. United States*,—falls equally short of sustaining his view.

The only connection which *Rankin vs. Hoyt*, in which *Tappan vs. United States* is cited, has with the present case is that it is there said (p. 335) that revenue appraisers are denominated in that case "a species of 'legislative referees;'" but as to whether "legislative referees" are competent witnesses in respect to their own findings, there is absolutely no discussion or hint.

Turning, then, to *Tappan vs. United States*, 2 Mason, 393, we do find that at p. 406, the phrase "legislative referees," appears, but not a word is said—for the case did not remotely raise the question—as to the competency of the appraisers to testify of their own actings or findings.

Tappan vs. United States is, however, an interesting case, argued by able counsel and decided by Judge STORY, but the only point it discusses or decides is that "silver dollars are goods, wares and merchandise" within the 50th Section of the Revenue Act of 3d of March, 1799, Ch. 128, for the landing of which a permit from the Custom House is necessary"!

But the arguments of the learned Judge below, if not his citations, are entitled to respectful consideration. They consist, however, of little more than a statement of what he deems a train of dire consequences to follow from allowing a merchant appraiser to tell whether he had "any familiarity with the goods in question," and whether he made "any examination" of them. "That, and nothing more."

XII.

Since the filing of our main brief one reported case, which we deem important on this point, has come to our notice—*Marquette, Houghton and Ontonagon R. R. Co. vs. Probate Judge*, 53 Mich., 217.

The case was this: The railroad company began proceedings in the Probate Court to condemn certain lands for railroad puposes. Commissioners having been appointed, their report was made and filed. The company made a motion to set aside the report and findings on several grounds: (1) because the damages were excessive; (2) because certain amounts were included in the damages without evidence to support them; (3) because a certain other sum was improperly included; (4) because the Commissioners grossly overestimated the value of the lands, structures and damages; (5) because each of the three Commissioners separately fixed his award and agreed to add their several awards and divide the sum by three and make the quotient their award, and did so; (6) because the Commissioners allowed as damages more than the entire value of the property condemned.

The company offered to support its motion and the above grounds by oral testimony and affidavits. This was met by a motion to strike the affidavits from the files on the ground of their incompetency. The Probate Judge granted the latter motion. The company thereupon applied to the Supreme Court for an order to show cause why he should not receive and consider said affidavits and set aside the report.

The Supreme Court decided that the company's motion to set aside the report was a proper one, and, if substantiated, would warrant the granting of the motion, holding that the Probate Court had authority to set aside the report for good cause shown, and indicat-

ing the grounds which constitute good cause, with citations of authorities, to which we call special attention.

Among the affidavits offered in support of the motion was one by one of the Commissioners. Upon this, the Court says: "This was proper. The Commissioners "are not like a common law jury, and *their own affidavits* "*may be used to impeach their findings*, or show that they "proceeded upon a wrong principle in the ascertainment "of damages. The rule on which they act *is a fact, and* "*may be shown as any other fact. Canal Bk. vs. Albany*, "9 Wend., 244; *New Jersey R. & T. Co. vs. Sugdam*, 17 "N. J. Law, 25."

The *fifth* ground for setting aside the report—the agreement to make an award equal to one-third the sum of the separate findings—was likewise supported by *the affidavit of one of the Commissioners*. The Court sustains the admissibility of the affidavit and the ground of objection, holding that all parties are entitled to the intelligent judgment of the Commissioners and that to leave the amount to any result of chance was illegal, citing abundant authorities.

The case above cited, of *Canal Bank vs. Albany*, 9 Wend., 244, was a case of *certiorari* to review proceedings for widening a street. The proceedings reviewed consisted of the finding or "inquisition" of a jury of five freeholders, appointed by the Mayor, Aldermen and Commonalty, to assess the damages. The case was argued by eminent counsel and decided by Judge NELSON. The Court says:

"This is a summary proceeding and to be heard according to the rules and practice, and in the mode peculiar to such a hearing. * * * Hence, the affidavits of the parties and all persons interested, and all proof of a secondary character are heard. * * * It was said upon the argument that the affidavits of the jurors were inadmissible to contradict or impeach in any way their inquisition, and therefore affidavits of

the confessions or admissions of the jury were incompetent. One answer to this argument is that if the affidavits were not competent evidence to be considered by the Court they should have been objected to and rejected. * * * Being received, the plaintiffs had a right to rely upon their sufficiency if uncontradicted. * * * But I am satisfied the affidavits were properly admitted. It is true that the rule rejecting the affidavits of jurors, and of course their confessions or admissions, to impeach their verdict is strict, and rarely, if ever, departed from; *1 Archb. Pr.*, 197, and cases there cited; *5 Cowen*, 106; *6 Id.*, 54; *1 Wend.*, 297; *3 Caines*, 57; *4 Johns. R.*, 486; *15 Id.*, 309; and I am not now disposed either to vindicate or impugn it. There are cases, both in our own and the English courts, in which appeals to the sense of justice of the courts have excluded, if not overcome, the stubbornness of the rule. I admit they are few, and do not intend to multiply them. It is enough that the rule is exclusively applicable to a *common law jury*, and is never applied or enforced where a body of men are substituted in their place, as in the case of *arbitrators*, REFEREES, *commissioners*, &c. The principle applicable to a common law jury never could be endured in these cases, and the grounds upon which it may be defended when confined to the verdict of the jury, do not here exist. The common-law jury is carefully selected by lot from the body of the county and again from the panel; issues of fact are formally made up for their consideration and decision; disinterested witnesses only are heard before them, who are thoroughly examined by the counsel of respective parties; questions of law and fact are fully investigated; and the whole case is summed up before them by the Court, who give to the jury the law, being responsible to the parties for its correctness, and present to them the questions of fact to be considered and decided. The jury retire under the charge of an officer of the Court, sworn not to

speak to them himself, nor allow others to speak to them, and to keep them together till they have agreed on their verdict, and then return with them into Court to render the same. Even then, if the Court are dissatisfied with the verdict, the jury may again be sent out to reconsider the case, and they are entitled to the advice of the Court in any stage of their deliberations.

It is obvious, from this brief sketch of a common-law jury; from the multiplied means of accurate information, both in law and in fact; from the guards which have been cautiously and securely thrown around them to prevent extraneous influences, or the knowledge of any fact or circumstance except such as transpired in open Court, all afford to the parties great security against error or mistake by the jury and some foundation in reason for the policy of the rule which can exist in no other proceedings. In this case there is nothing to characterize the twelve men empaneled as a jury but the name and mode of a selection. They are, by the act, to return their inquisition to the Mayor's Court "at or before the end of the second term thereafter," meaning the second term after they are empaneled; during all the intermediate time they go at large, among all parties in interest, and obtain, each for himself, such information as they please, in the course of the execution of their duties. We do not say that this is the most judicious mode of proceeding to attain the end contemplated by the law; it may be so; all we contend for is, *that a body of men proceeding in this manner in examining, considering, and settling great and important interests, and rights of property, are not entitled to the appellation, nor their verdict nor inquisition to the attribute or sanctity, of a common-law jury.* We might as well award the character of a jury to the five disinterested freeholders who apportion the damages upon the houses and lots benefited in the City of New York under the Act of 1807, or to the three commissioners now appointed by the Su-

preme Court to discharge the like duty, or to the superintendent who is directed by the Act of 1826 to make a just and equitable assessment upon owners benefited, &c. The present jury are but a substitute for these different bodies of men. * * * If, then, the proceedings of such a jury are not to be regarded as those of a common-law jury, of which I cannot doubt, *the Court were bound to receive the affidavits of any one of them offered by the plaintiffs, and if they could not be obtained, then admissions or confessions were competent evidence on the summary hearing.*"

The case of *N. J. R. & Tr. Co. vs. Suydam*, 17 N. J. Law, 25, cited above, was *certiorari* to review the award of the commissioners appointed under the statute to assess damages for running and maintaining fences through lands of the defendant. This case, too, was fully argued by well-known counsel, and decided by Ch.-Justice HORNBLOWER in an opinion of characteristic thoroughness. The Court holds that proceedings in such cases will be set aside, if the commissioners are shown to have acted "upon illegal principles in making their valuation of lands and assessment of damages"; —to "ascertain which facts, affidavits may be taken and read before this court, in *certiorari*, although the merits of the case may not be inquired into." (syllabus).

The report of this case, strangely, does not show by whom the affidavits received and considered in the Supreme Court were made, but from the nature of the facts referred to in the opinion of the Court, as well as from the main ground of decision of the case—the adoption by the commissioners of improper rules for estimating value and damages—it is difficult to see how the facts could have been derived from any other source than *the commissioners themselves.* Such, too, must have been the view, we conclude, of the Superme Court of Michigan in citing the case for its purpose.

Applying these authorities to the present case, we find that very high authority holds that in the case of functionaries of the same description as revenue or custom appraisers, their testimony is competent to show facts which invalidate their findings and awards. If, therefore, as Judge COXE insists, the appraisers here are "legislative referees," unless there be some "divinity" that "doth hedge" a *legislative* referee more than other referees, then, according to Judge NELSON, these appraisers are not only competent but compellable witnesses.

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ADDENDUM.

An unremitting search for authorities, continued since the preparation of the foregoing brief, has been rewarded by the discovery of the following cases which it seems proper to present :

I.

The qualifications of an appraiser must be in absolute compliance with the statute, or the appraisement is void.

This is the rule under State Appraisement Laws.

Glidden vs. Philbrick, 56 Maine, 222, where it was held that a levy made under an execution under a statute requiring the appraisal to be made by "three discreet and disinterested men," was void where the Sheriff failed to return that the appraisers were discreet *and* disinterested men.

So, in *Pierce vs. Strickland*, 26 Maine, 278, where it was held again that it must appear by the return that the appraisers were "discreet *and* disinterested." If it states they are discreet and freeholders, it is not good.

So, in *Tweed vs. Pickett*, 1 Day (Conn.), 109, it was held that in order to make out title under a levy the appraisers must be shown to be *indifferent* and also that they were *sworn* according to law, and that one of the appraisers, being an uncle of a party, rendered the appraisal void and the title bad.

II.

Can the disqualification of an appraiser be shown by his own testimony?

It can, unless the giving of such testimony would be to "impeach" his appraisement; for, it is well settled that an appraisement is an arbitration or award.

Mayor vs. Butler, 1 Barb., 334.
Rogers vs. Kruger, 7 Johns., 557.

It is equally well settled that an arbitrator cannot "impeach" his award.

Campbell vs. Western, 3 Paige, 126.
Mayor vs. Butler, 1 Barb., 334.

But an arbitrator can testify to facts which invalidate his award; and the only question in this case is, whether the evidence offered "impeaches" the appraisement?

As we have already said, an appraisement or award may be invalidated by the evidence of the appraiser or arbitrator himself without being "impeached," in the technical sense which forbids such testimony.

If, for example, the appraiser is not a citizen of the United States as required by the statute, he must be a proper witness to prove that fact; and if he is a proper witness to prove that fact, he must be a proper witness to prove that he was not a "discreet or experienced merchant," nor "familiar with the character and value of the goods in question."

In the present case the appraiser nowhere certifies that he has the qualifications named in the statute. (Records, fols. 43–70, pp. 25–49). See also the oath and form of certificate in *Greely vs. Thompson*, 10 How., 225, 227, 229.

His oath does not state that he has the statutory qualifications (Record, fol. 42). And if it did, that is no part of his appraisement or award.

In testifying, therefore, that he is not a citizen of the United States or was not familiar with the character and value of the goods in question, he does not contradict his oath or his certificate of appraisement, which

is silent on these points. Nor does he testify to his own " neglect of duty ; " he merely establishes by his evidence a fact or facts which, as a legal result, may invalidate the appraisement.

The authorities are clear that he can do this.

A juror even can invalidate a verdict by testifying to facts concerning himself. He is simply excluded from testifying to what happened in the jury room, or as to the elements of his verdict, the verdict itself being held to be the best evidence of this.

Sedley v. Hall, 22 Maine, 198.
Hewitt v. Chapman, 49 Mich., 4.

A judge may, by his evidence, invalidate a deed by proving that he took the acknowledgement in Canada.

Jackson v. Humphrey, 1 Johns., 498.

In fact, in New York, even a notary public can contradict his certificate by his evidence.

Onondaga Bank v. Bates, 3 Hill, 53.
See also *Stewart v. Allison*, 6 Serg & Rawle, 324.

And the same doctrine is held in the case of *Adams v. Wright*, 14 Wisc., 408.

In *Mayor v. Butler*, 1 Barb., 335, it is declared that an arbitrator may properly be sworn to overthrow an award by his evidence that the arbitrators did or did not take into consideration a particular subject, and that this would not be to " impeach " his award.

To the same effect see

Briggs v. Smith, 20 Barb., 44.

In the case of *Cole v. Blunt*, 15 N. Y., Sup. Ct. (2nd Bosw.),one of the arbitrators was sworn and the Court decided that he could testify when the award was made with a view of invalidating it, by showing that it was made without the limited time.

The Court says (p. 124) : " As I have already said,

the material facts showing an excess of authority on the part of the arbitrators was proved by one of their number and it was objected upon the trial that he was an incompetent witness. The objection was renewed upon argument before us, but we think the objection untenable. It may be true that before the Code, and we will not say that such is not still the law, an arbitrator was an incompetent witness. He was not permitted to impeach an award by proving facts that occured in the intercourse of the arbitrators with each other, or in their secret deliberations; but we are not aware and cannot believe that it has ever been held or supposed that arbitrators might not be admitted to testify to facts that occurred upon a public hearing and in the presence of the parties and to the decisions that were then openly made by himself and his associates; and it appears to us that to exclude his testimony in relation to such facts should be quite as unreasonable as to hold that a judge may not sign a bill of exceptions containing the proceedings and his own decisions upon the trial."

In *Underhill v. Van Courtland*, 2 Johns Ch., 339, all the arbitrators appear to have been examined as witnesses.

And in *Newland v Douglass*, 2 Johns., 62, the ground of the decision was not that the witness was incompetent but that in a Court of law the proof offered was inadmissible.

In view of the singular misapprehension of the case, expressed especially in the first paragraph of his opinion on p. 43 (22 Blatch., 41),—by Judge Coxe, we desire, again to say, and to emphasize it, that if the merchant appraiser in this case had been permitted to testify fully in reply to *all* the questions which we asked on the trial below, respecting his qualifications, he would not, in any respect, have denied his oath or stultified himself or contradicted any record.

See opinion of Judge Coxe, page 44.